

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 97

CAFETERIA AND RESTAURANT WORKERS
UNION, LOCAL 473, AFL-CIO, ET AL.,
PETITIONERS,

vs.

NEIL H. McELROY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR CERTIORARI FILED MAY 24, 1960
CERTIORARI GRANTED OCTOBER 10, 1960

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

—
No. 14,689
—

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, ET AL., *Appellants*

v.

NEIL H. McELROY, INDIVIDUALLY AND AS SECRETARY
OF DEFENSE, ET AL., *Appellees*

—
Appeal From the United States District Court for the
District of Columbia
—

JOINT APPENDIX

—
Relevant Docket Entries

September 6, 1957—Complaint filed.

October 7, 1957—Answer of M & M Restaurants, Inc. filed.

November 4, 1957—Answer of McElroy, Gates, Tyree and
Williams filed.

November 13, 1957—Interrogatories filed by appellants.

December 23, 1957—Answers to interrogatories filed.

February 8, 1958—Appellants' motion for summary judgment filed.

February 27, 1958—Motion of McElroy, Gates, Tyree and
Williams to dismiss the complaint or for summary
judgment filed.

March 11, 1958—Motion supplementing motion of McElroy, Gates, Tyree and Williams to dismiss complaint or for summary judgment filed.

March 14, 1958—Affidavits of Rachel M. Brawner and Oliver T. Palmer filed.

April 14, 1958—Affidavit of Denver E. McKaye filed.

April 14, 1958—Hearing on cross-motions held.

July 30, 1958—Order dismissing the complaint docketed.

August 14, 1958—Notice of appeal filed.

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(Filed Sept. 6, 1957)

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action No. 2246-57

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, 1438 U Street, N. W., Washington, D. C., and

RACHEL M. BRAWNER, 2342 Pomeroy Road, S. E.,
Washington, D. C., *Plaintiffs,*

v.

NEIL H. McELROY, INDIVIDUALLY AND AS SECRETARY OF DEFENSE, AND THOMAS S. GATES, INDIVIDUALLY AND AS SECRETARY OF THE NAVY, The Pentagon, Washington 25, D. C., and

D. M. TYREE, INDIVIDUALLY AND AS SUPERINTENDENT OF THE UNITED STATES NAVAL GUN FACTORY, AND H. C. WILLIAMS, INDIVIDUALLY AND AS SECURITY OFFICER OF THE UNITED STATES NAVAL GUN FACTORY, M and Eighth Streets, S. E., Washington, D. C., and

M & M RESTAURANTS, INC., DOING BUSINESS AS NAVY YARD CAFETERIAS, M and Eighth Streets, S. E., Washington, D. C., *Defendants.*

Complaint for Declaratory Judgment, for Injunctive Relief, to Vacate an Arbitration Award, and to Recover Damages

Plaintiffs, for their complaint, allege:

1. The Court has jurisdiction under 62 Stat. 930, 28 U.S.C. § 1331, as a civil action arising under the Constitution and laws of the United States, wherein the matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs; under 62 Stat. 931, 28 U.S.C. § 1337, as a civil action arising under the National Labor Relations Act (49 Stat. 449, as amended, 61 Stat. 136, 29 U.S.C. § 151), an Act of Congress regulating commerce; under Section 301(a), Title III, Labor Management Relations Act, 1947 (61 Stat. 156, 29 U.S.C. § 185), as a suit for violation of a contract between an employer and a labor organization representing employees in an industry affecting commerce; and under D. C. Code, § 11-306 (1951).

2. Plaintiff Cafeteria and Restaurant Workers Union, Local 473; AFL-CIO, an unincorporated voluntary association, herein called the Union, resides within the District of Columbia, transacts business within the District of Columbia, and has its office at 1438 U Street, N. W., Washington, D. C. The Union is affiliated with Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. In January 1956, at the time of its affiliation with the International Union, and as a result of such affiliation, the numerical designation of the Union was changed from "471" to "473". The Union remained one and the same organization despite the change in its numerical designation. The Union represents for purposes of collective bargaining and other mutual aid and protection employees who work in cafeterias and restaurants within the District of Columbia and the adjacent area. It represents about 2,600 employees working within the District of Columbia and the adjacent area. The Union represents employees in an industry affecting commerce within the

meaning of Section 301(a), Title III, Labor Management Relations Act, 1947, and Sections 2(6) and (7) of the National Labor Relations Act.

3. Plaintiff Rachel M. Brawner resides within the District of Columbia at 2342 Pomeroy Road, S. E., Washington, D. C. She is a member of the Union.

4. Defendant Neil H. McElroy is Secretary of Defense. Defendant Thomas S. Gates is Secretary of the Navy. Defendant D. M. Tyree, who holds the rank of Admiral in the Navy, is superintendent of the United States Naval Gun Factory, an installation within the Department of the Navy located in the District of Columbia. Defendant H. C. Williams, who holds the rank of Lieutenant Commander in the Navy, is security officer of the United States Naval Gun Factory.

5. Defendant M & M Restaurants, Inc., a corporation, herein called the Company, transacts business within the District of Columbia, and has an office at the United States Naval Gun Factory, M and Eighth Streets, Washington, D. C. It operates numerous cafeterias and restaurants in the several states, including Delaware, Maryland and

3 Virginia. It operates three main cafeterias for the United States Naval Gun Factory within the District of Columbia. In the course and conduct of its business, it engages in trade and commerce within the District of Columbia, and it causes goods to be shipped to it in substantial quantity from other states to the District of Columbia and from one state to another. Its activity affects commerce, and it is part of an industry affecting commerce, within the meaning of Section 301, Title III, Labor Management Relations Act, 1947, and Sections 2(6) and (7) of the National Labor Relations Act.

6. The matter in controversy exceeds the sum or value of \$3,000, exclusive of interest and costs.

7. Up to September 1946, the three cafeterias at the United States Naval Gun Factory were operated by a Miss

H. K. Dickson. In 1942, during the period of Miss Dickson's operation, the Union was certified by the National Labor Relations Board as the exclusive bargaining representative of the employees working at the cafeterias, following an election conducted by the Board on July 15, 1942. In September 1946, the Company took over the operation of the three cafeterias from Miss Dickson. From that time, continuously to date, the Company has recognized the Union as the exclusive bargaining representative of its employees at the three cafeterias. Section 1 of the collective bargaining agreement between the Company and the Union, entered into on March 15, 1954 and in effect at the times material to this controversy, provides that:

The Employer agrees to recognize the Union as the exclusive bargaining agency for all employees (excluding cashiers, checkers, and supervisors) of the Navy Yard Cafeterias, and of all cafeterias or food serving establishments which the Employer may take over and operate within the Navy Yard.

This collective bargaining agreement is annexed hereto as Exhibit A.

8. Section 6 of the aforesaid collective bargaining agreement provides in part that:

The Employer agrees not to suspend or discharge any employee without good and sufficient cause.

This provision has been in each of the collective bargaining agreements between the Company and the Union since the inception of their relationship in September 1946.

4 9. The employees at the three cafeterias operated by the Company for the Naval Gun Factory are civilian nongovernmental personnel. The Company is a civilian nongovernmental employer. The cafeterias are operated pursuant to an agreement, entered into on October 1, 1955, between the Company and the Board of Governors of the Naval Gun Factory Cafeterias. A form

of this agreement, styled "Agreement For Food Services Concessionaire," is annexed hereto as Exhibit B. The personnel of the Board of Governors, composed of seven civilian governmental employees employed by the Naval Gun Factory, are appointed by the Superintendent of the Naval Gun Factory. Section 5(h) of the aforesaid Concessionaire Agreement provides that:

The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this Agreement. In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who

(i) fail to pass satisfactory medical examinations where the handling of food is involved;

(ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;

(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity.

10. One of the three cafeterias operated by the Company for the United States Naval Gun Factory is known as the Bellevue Annex Cafeteria, located at Overlook Drive and Chesapeake Street, S. W., Washington, D. C. Plaintiff Rachel M. Brawner worked at that cafeteria as a short order or breakfast cook. Up to her discharge on November 15, 1956, Mrs. Brawner had been employed by the Company for six and one-half years. Working Monday through Friday, 6:00 a.m. to 3:00 p.m., at the hourly rate of \$1.18, Mrs. Brawner operated the steam table at the cafeteria, prepared and served breakfast and lunch, cleared tables, washed dishes, and cleaned up. The employment record of Mrs. Brawner was completely satisfactory and she was above average in the discharge of her duties.

11. On November 14, 1956, H. R. Pyles, Secretary-Treasurer of the Board of Governors, telephoned Harold R. Baker, supervisor of the Company's cafeterias at the Naval Gun Factory, to request that the Company have Plaintiff Rachel Brawner turn in her identification badge, stating that defendant H. C. Williams, security officer of the Naval Gun Factory, had advised that a question of security clearance for Brawner existed and that he, the security officer, would no longer permit her to have the badge. An identification badge is required to secure entrance to and exit from the grounds. H. R. Pyles further told Harold R. Baker that, should the request to lift Brawner's identification badge be questioned in view of the provision of the collective bargaining agreement safeguarding employees from discharge except for "good and sufficient cause," section 5(b) of the aforesaid Concessionaire Agreement should be cited as authority for the action requested.

12. On November 15, 1956, the Company relieved Plaintiff Brawner from work at the cafeteria, and instructed her to proceed to the office of Harold R. Baker. There, Baker stated to Brawner that he had been requested to pick up her identification badge, and, when asked why, he stated "for security reasons." Shocked and surprised, Brawner denied that she had ever done anything to bring her security status into question, and she asked what recourse she had. Baker stated he could not tell her anything except that he had been directed to pick up her badge. He suggested that she might see the security officer, or the superintendent, or Oliver T. Palmer, the business agent of the Union. Brawner turned in her badge.

13. On November 15, 1956, the Company discharged Brawner. From that day forward she has no longer worked for the Company. From that day forward she has received no wages or other benefits from the Company. Her employment with the Company was permanently severed.

14. On November 15, 1956, Baker turned over Brawner's identification badge to the security officer, defendant H. C. Williams. At that time, the security officer gave no reason for his action, except to say that he would not permit her to continue to retain the badge because her security status was in question. Neither before, then, nor thereafter did the security officer, the superintendent, the Board of Governors, or any other official give any explanation for this conclusion to either Brawner, the Union, or the Company.

15. In the course of her employment at the cafeteria, Brawner had no access to classified information. Harold R. Baker, supervisor of the Company's three cafeterias at the Naval Gun Factory, has no access to classified information.

6 16. At the time of her initial employment at the Naval Gun Factory, Brawner had been, as are all employees, screened by the security officer, and no question of security had been raised for six and one-half years.

17. On November 16, 1956, the Company received a confirmatory memorandum from the Board of Governors:

1. The Board was notified on the afternoon of November 14, 1956 by LCDR H. D. Williams, Security Officer, Naval Gun Factory, that Rachel Brawner, head steam table employee, presently working at the Bellevue Cafeteria, would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer.

2. This office immediately contacted Mr. Baker and requested to return the badge. Rachel Brawner's badge was returned to the Security Officer on 15 November 1956.

18. On November 15, 1956, immediately following her discharge, Plaintiff Brawner went directly to see Oliver T. Palmer, business agent of the Union, and reported to him what had transpired. At a meeting of representatives

of the Company and the Union on November 20, 1956, and in ensuing correspondence between the Company and the Union, the Union protested that the Company's discharge of Plaintiff Brawner was "without good and sufficient cause" and hence in violation of Section 6 of the aforesaid collective bargaining agreement. The Union repeatedly sought from the Company a statement of the reasons underlying the conclusion that Mrs. Brawner did not meet security requirements. The Company repeatedly replied that it did not know, and was unable to obtain from either the Security Officer or the Superintendent of the Naval Gun Factory, any elucidation of the underlying reasons. The Company took the position that its action was based on Section 5(b) (iii) of the aforesaid Concessionaire Agreement. Copies of the correspondence between the Company and the Union are annexed hereto as Exhibits C, D, E, F, G, G-1, H, and I.

19. In connection with the Union's attempt to secure a statement of reasons underlying the conclusion that Plaintiff Brawner's security status was in question, the Union also requested that a meeting be arranged with officials of the United States Naval Gun Factory at which to discuss the matter, and that a fair hearing be accorded Plaintiff Brawner. On December 12, 1956, the Company wrote the Board of Governors, United States Naval Gun Factory Cafeterias, to request "that a meeting be arranged during the week January 7-11, 1957, for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner." This letter has heretofore been annexed to this complaint as Exhibit G-1. On January 10, 1957, the Company wrote the Union to state that:

We have been informed by the Superintendent, U.S. Naval Gun Factory via the Board of Governors, U.S. Naval Gun Factory Cafeterias, that such a meeting would serve no useful purpose and is therefore unnecessary.

This letter has heretofore been annexed to this complaint as Exhibit I. This response was based on a memorandum to the Company from the Board of Governors, which enclosed a memorandum from the Superintendent to the Board of Governors. The latter memorandum reads:

1. By reference (a), the Chairman of the Board of Governors, Naval Gun Factory Cafeterias, requested that a meeting be arranged, participants consisting of the Naval Gun Factory Security Officer, members of the Board of Governors, representatives of M & M Restaurants, Inc. and agents of the Restaurant Employees Union to discuss the action relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner, a cafeteria employee.
 2. Paragraph 5(b) iii of reference (b) [Agreement for Food Services Concessionaire between Board of Governors, U.S. Naval Gun Factory and M & M Restaurants, Inc. of 1 October 1955 (Nav Exos 3732 (4-55))] stipulates that the contractors will employ only those who meet the security requirements for admission to the Naval Gun Factory. It is considered that the subject cafeteria employee does not meet these security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.
 3. It is considered that the above decision is proper in this case and that the meeting proposed in reference (a) would serve no useful purpose and is therefore unnecessary.
20. On January 11, 1957, in accordance with Section 24 of the aforesaid collective bargaining agreement, the Union wrote the Company requesting arbitration of the discharge of Plaintiff Brawner and naming Samuel H. Jaffee as its designee on the Board of Arbitration. A copy of this letter is annexed hereto as Exhibit J. On January 16, 1957, the Company wrote the Union acknowledging the request for arbitration and naming Vinton E. Lee as its designee on the Board of Arbitration. A copy of this letter is annexed hereto as Exhibit K. Thereafter, the

Company substituted John B. Cullen for Vinton E. Lee.

On February 1, 1957, Samuel H. Jaffee filed a Demand for Arbitration with the American Arbitration Association. A copy of this demand is annexed hereto as Exhibit L. It reads in part as follows:

Claim:

On November 15, 1956, the Company, improperly and contrary to contract, discharged Rachel Brawner without good and sufficient cause.

Relief:

The relief requested is that the Company be required to reinstate Rachel Brawner; that Rachel Brawner be made whole for any loss of pay she sustained as a result of her discharge; and that such other and further relief be granted as is appropriate.

Thereafter, pursuant to the procedures of the American Arbitration Association, Nathan Cayton was appointed as the third and impartial member of the Board of Arbitration. A hearing before the Board of Arbitration was set for May 2, 1957.

21. Meanwhile, on January 30, 1957, Bernard Dunau, the Union's attorney, wrote to the Superintendent, Naval Gun Factory, to request the procedure and authority for the action taken against Plaintiff Brawner. This letter is annexed hereto as Exhibit M. It reads in part that:

We are informed that on November 15, 1956, Mrs. Rachel Brawner, an employee of M & M Restaurants, Inc. at the Naval Gun Factory cafeteria and a member of the Union, was discharged by the employer because you or your security officer determined that Mrs. Brawner did not meet security requirements. As presently advised, we have been unable to ascertain under what authority, and in accordance with what procedure, that security determination was made. Would you therefore be good enough to apprise me of the statute, executive order, departmental regulation, and/

or other basis pursuant to which this determination was made.

Under date of February 27, 1957, a reply was received from the Superintendent. This reply is annexed hereto as Exhibit N. It reads in part that:

The written agreement entered into by the Board of Governors, U.S. Naval Gun Factory Cafeterias and M & M Restaurants, Inc. on 1 October 1955 specifies that the employees of the M & M Restaurants, Inc. who work in the Naval Gun Factory Cafeterias must meet the basic security requirements as regards entrance to the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked.

Attached to the letter was a form agreement, styled "Agreement for Food Services Concessionaire," with the penciled notation at the head of it "Executed 1 Oct 1955," and with part iii of Section 5(b) bracketed. This form has heretofore been annexed to this complaint as Exhibit B.

9 22. On April 17, 1957, the Union, by its attorney, wrote to the Superintendent of the Naval Gun Factory to apprise him of the arbitration hearing to be held on May 2, 1957, and to state that:

You are invited, personally or by a representative, to attend the hearing to state your position and present evidence in its support relevant to your part or that of your subordinates, in causing Mrs. Brawner's discharge.

This letter is annexed hereto as Exhibit O. No appearance was made either personally or by a representative.

23. On May 2, 1957, a hearing was held before the Board of Arbitration. A stenographic transcript of the hearing was made. A copy of the transcript is annexed hereto as Exhibit P. In addition, Exhibits A through K and M through O, annexed to this complaint, were introduced

at the hearing before the Board of Arbitration as Union's Exhibits 1 through 14. Those exhibits annexed to this complaint which were also introduced at the hearing before the Board of Arbitration bear at the upper right-hand corner of the exhibit the identification given them in this complaint and before the Board of Arbitration. Company exhibits 1, 2, and 2-A, introduced by the Company before the Board of Arbitration, were read into the record and appear at pp. 36-38 of Exhibit P. The Company annexed to its post-hearing brief before the Board of Arbitration a purported excerpt from an agreement between it and the Board of Governors, Naval Gun Factory Cafeterias, entered into on August 16, 1946. This excerpt is annexed hereto as Exhibit Q. Finally, the Union introduced before the Board of Arbitration as its exhibit 15 the opinion and award in *National Food Corporation*, reported at 24 Labor Arbitration Reports 567 and annexed hereto as Exhibit R. In that case, pursuant to the request of the Director of Security Division, Office of the Secretary of Defense, relayed to the employer by the Department of Defense Concessions Committee, the employer, National Food Corporation, discharged an employee, Esther Mae Thompson, who worked in a cafeteria within the Pentagon operated by the employer, the ground for the discharge being the determination by the Director of Security Division that Thompson's security status was in question. The Board of Arbitration held that Thompson's discharge was without "sufficient cause," and it ordered her reinstated with back pay. Thompson was reinstated, with back pay, and she continues to date to work in the cafeteria within the Pentagon. A relevant excerpt from the opinion in the *National Food Corporation* case is as follows:

The Company contends that this Board of Arbitration is without power to review the determination of the Director of Security Division, Office of the Secretary of Defense, that Thompson was a security risk. This contention would be relevant if the Director were

authorized to determine that an employee in Thompson's class was a security risk and to request the employee's discharge upon such determination. But the Company has not shown, and our independent search has not uncovered, any statute, executive order, or regulation authorizing the Director to act in the premises. The Company concedes that neither the Industrial Personnel and Facility Security Clearance Program, applicable to nongovernmental employees with access to classified information, nor the security requirements for government employment, applicable to government employees, have any relevance to an employee in Thompson's position. Not only do these programs not confer any authority on the Director with respect to an employee in Thompson's position, but by not conferring any such authority they negate the existence of the authority assumed by the Director. It is significant that the very safeguards accorded nongovernmental employees with access to classified information or accorded governmental employees by these programs would have prevented just the summary action to which Thompson, a non-governmental employee with no access to classified information, was subjected.

24. The Union did not know of the Concessionaire Agreement, or of Section 5(b) thereof (see paragraph 9, *supra*), until the Company disclosed their existence after Rachel Brawner was discharged. The Union did not see a copy of the Concessionaire Agreement until a form of it was sent by the superintendent of the Naval Gun Factory to the Union's attorney under date of February 27, 1957, more than three months after Rachel Brawner's discharge. The Union did not know of the memoranda listed in paragraphs 17 and 19, *supra*, until adduced by the Company at the hearing before the Board of Arbitration.

25. Under date of August 6, 1957, the American Arbitration Association sent to representatives of the Company and the Union the award of a majority of the Board of Arbitration in the instant matter, and the majority and

dissenting opinions. The majority of the Board of Arbitration, Samuel H. Jaffee dissenting, held that Plaintiff "Rachel Brawner was not discharged without good and sufficient cause. . . ." The majority based this conclusion on its view that (1) Rachel Brawner had not been discharged because the Company had expressed its willingness to reemploy her "if she could prevail on the

11 government officials to restore her security badge," and (2) the Union should not proceed under the collective bargaining agreement to redress Brawner's discharge, but should proceed in some other way, for the "real grievance of the employee and of her Union" is not against the Company for effecting her discharge but it is against the governmental officials for causing her discharge. A copy of the award, of the majority opinion, and of the dissenting opinion are annexed hereto as Exhibit S.

26. Defendants Neil H. McElory, Thomas S. Gates, D. M. Tyree, and H. C. Williams were and are wholly without authority, whether by way of statute, executive order, regulation, or otherwise, to formulate their own undisclosed security requirements and to cause the discharge of Plaintiff Rachel M. Brawner, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon their bare say-so that Rachel M. Brawner fails to meet those requirements. In the alternative, if such authority exists, its exercise constitutes a deprivation of property without due process of law in contravention of the Fifth Amendment of the United States Constitution.

27. The action of Defendant M & M Restaurants, Inc., in discharging Rachel M. Brawner for no reason other than the unauthorized or unconstitutional demand as stated in paragraph 25, constitutes a violation of Section 6 of the collective bargaining agreement by which it promised "not to suspend or discharge any employee without good and sufficient cause."

28. The award of the majority of the Board of Arbitration is void for the reasons that (1) the majority exceeded its powers, (2) the majority so imperfectly executed its powers that its award fails to constitute a determination of the matter submitted to it, (3) the award has no support in, but is in manifest disregard of, law, fact, and reason, and (4) the award is against public policy.

WHEREFORE, plaintiffs pray that a judgment be entered:

1. Declaring that Defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree, and H. C. Williams were and are wholly without authority, whether by way of statute, executive order, regulation, or otherwise, to formulate their own undisclosed security requirements and to cause the discharge of Plaintiff Rachel M. Brawner, or employees in her class, without any explication of the underlying reasons or any opportunity to know or meet the evidence, upon their bare say-so that Rachel M. Brawner, or employees in her class, fail to meet those requirements; in the alternative, that if such authority exists, its exercise constitutes a deprivation of property without due process of law; and that the action of Defendant M & M Restaurants, Inc., in discharging Rachel M. Brawner, or employees in her class, for no reason other than compliance with such unauthorized or unconstitutional demand, constitutes a violation of Section 6 of the collective bargaining agreement by which the Company promised "not to suspend or discharge any employees without good and sufficient cause."

2. Requiring Defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree, and H. C. Williams to withdraw their determination that Rachel M. Brawner fails to meet security requirements, to inform Defendant M & M Restaurants, Inc., that they have no objection to the employment of Rachel M. Brawner by the Company, to furnish Rachel M. Brawner an identification badge authorizing her to enter and leave the grounds of the Naval Gun Factory for

the purpose of going to and from her place of employment, and to cease and desist from in any way interfering with Rachel M. Brawner in obtaining or retaining employment with M & M Restaurants, Inc.

3. Requiring Defendant M & M Restaurants, Inc. to reinstate Rachel M. Brawner to the position from which it discharged her, with full seniority and other perquisites of her employment, and to make her whole for any loss of pay she sustained for the period between her discharge on November 15, 1956 and her reinstatement, with interest at the rate of six per cent per annum from November 15, 1956.

4. Holding Defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree, and H. C. Williams, together with M & M Restaurants, Inc., jointly and severally liable to Rachel M. Brawner for reimbursing her for any loss of pay she sustained for the period between her discharge on November 15, 1956 and her reinstatement, with interest at the rate of six percent per annum from November 15, 1956.

5. Vacating the award of the majority of the Board of Arbitration.

6. Granting plaintiffs the costs of this action.

13 7. Granting such other and further relief as may be appropriate.

/s/ BERNARD DUNAU
Bernard Dunau

JAFFEE & DUNAU
912 Dupont Circle Building, N.W.
Washington 6, D. C.

Attorney for Plaintiffs.

VERIFICATION

CITY OF WASHINGTON }
DISTRICT OF COLUMBIA } SS:

Bernard Dunau, attorney for plaintiffs herein, being first duly sworn, on oath deposes and says that he has read the foregoing complaint by him subscribed; that he knows the contents thereof; and that he verily believes the matters therein set forth to be true.

/s/ BERNARD DUNAU
Bernard Dunau

Subscribed to and sworn before me
this 5th day of September, 1957.

/s/ W. G. BADEN

Notary Public, District of Columbia

My Commission expires March 31, 1959

14

Exhibit A
[Un. Arb. Ex. 1]

AGREEMENT

This Agreement made and entered into this 15th day of March 1954, by and between M & M Restaurants, Inc., a corporation doing business as Navy Yard Cafeterias, hereinafter called the "Employer," and the UNITED CAFETERIA AND RESTAURANT WORKERS, LOCAL UNION No. 471, hereinafter called the "Union;" and in consideration of the mutual promises herein made, the parties agree as follows:

1. The Employer agrees to recognize the Union as the exclusive collective bargaining agency for all employees (excluding cashiers, checkers, and supervisors) of the Navy

Yard Cafeterias, and of all cafeterias or food serving establishments which the Employer may take over and operate within the Navy Yard.

15 6. The Employer agrees not to suspend or discharge any employee without good and sufficient cause. If the Union shall prove that an employee was suspended or discharged without good and sufficient cause, such employee shall upon reinstatement, be compensated for time lost.

20 24. The parties agree that they will endeavor to adjust any dispute that may arise from the interpretation or application of this Agreement within a period of 48 hours. In the event that no accord can be reached, the matter in dispute shall be referred to a Board of Arbitration within two days from the date which the parties to the Agreement shall fail to reach an agreement in connection with the matter in dispute, and said Board of Arbitration shall be composed of one representative of the Employer and one representative of the Union, and one disinterested party chosen by the two said members of the Board of Arbitration. In the event the two parties shall fail to agree on a third disinterested party, the parties agree that the American Arbitration Association be requested to appoint a person to serve in the capacity of the third and impartial arbitrator.

27. This Agreement shall be in full force and effect from March 15, 1954 to March 15, 1957, and shall continue from year to year unless either party gives notice, in writing, sixty (60) days prior to March 15, 1957, of its desire to negotiate a new contract; however, it is further agreed between the parties that the question of wage rates
21 only may be reopened on September 15, 1955, pro-

vided either party gives notice in writing thirty (30) days prior to September 15, 1955 of its desire to reopen the question of wages.

DENVER E. MCKAYE, *Pres.*
For the Employer

EDWARD J. FISHER
For the Union

Witnessed By:

CLAUDE S. BREEDEN, JR.

OLIVER T. PALMER

26

Exhibit C
[Un. Arb. Ex. 2]

November 20, 1956

Mr. Denver McKaye, President
M & M Restaurants, Inc.
Navy Yard Cafeterias
8th and M Streets, S. E.
Washington 25, D. C.

Dear Mr. McKaye:

This is a formal protest against the suspension of Mrs. Rachel Brawner.

On Thursday, November 15, 1956, Mrs. Brawner was relieved of her badge and separated from your employ. So far we have been unable to obtain any evidence that your action was taken with "good and sufficient cause." We, therefore, request immediate reinstatement of Mrs. Brawner in her job and that she be made whole for any loss she has suffered or will suffer until she is reinstated.

In our meeting held today with you on this matter, you indicated you had acted as a result of notification from

the Board of Governors of the Navy Yard to the effect that Mrs. Brawner's security clearance had been cancelled. However, other than the foregoing, you gave us no further facts which would establish that your action was taken in keeping with the language, spirit and intent of Section 6 of the existing contract between us. We hereby request any and all information you may have to support your position.

We will highly appreciate your early reply.

Very truly yours,

OLIVER T. PALMER
Business Agent.

27

Exhibit D
[Un. Arb. Ex. 3]

November 26, 1956

Cafeteria and Restaurant Workers Union
Local 473
1438 "U" Street, N. W.
Washington 9, D. C.

Attention: Mr. Oliver T. Palmer, Business Agent

Re: Your letter 20 November 1956

Dear Mr. Palmer:

Pursuant to your letter regarding Mrs. Rachel Brawner, please be advised that our action was based on the following:

A. Clause No. 3 operating contract which reads:

iii—Fail to meet the security requirements or other requirements under applicable regulations of the activity, as determined by the security officer of the activity.

B. Letter dated 16 November 1956 from Board of Governors, Naval Gun Factory Cafeterias, requesting the surrender of admittance badge until clearance is certified by the security officer.

It is suggested that a request be made for an appeal hearing which will be submitted to the Board of Governors by M & M Restaurants, Inc.

Every effort will be forth coming on the part of representatives of the Board of Governors as well as M & M Restaurants, Inc. to assist in arranging the appeal hearing with the security officer.

Very truly yours,

M & M RESTAURANTS, INC.

D. E. McKAYE, *President*

DEMcK:mvb

28

Exhibit E

[Un. Arb. Ex. 4]

November 28, 1956

Mr. D. E. McKaye, President
M & M Restaurants, Inc.
Naval Gun Factory Cafeterias
8th and M Streets, S. E.
Washington 25, D. C.

Re: Mrs. Rachel Brawner

Dear Mr. McKaye:

This is in reply to your communication of November 26, 1956 concerning the above subject matter.

We will highly appreciate more definite information and we hereby request the following:

1. Copies of your "operating contract" and the letter from the Board of Governors to which you made reference in Sections A & B of your communication;
2. More details concerning the nature of the appeal hearing suggested and the procedure of such a hearing; and
3. More specifics as to why Mrs. Brawner's security clearance was discontinued.

In order to avoid any misunderstanding we wish to make it clear that your compliance with the request enumerated above will in no way prejudice our rights under the terms and conditions of the existing contract between us.

Very truly yours,

OLIVER T. PALMER
Business Agent

29

Exhibit F

[Un. Arb. Ex. 5]

M & M RESTAURANTS, INC.

December 4, 1956

Cafeteria and Restaurant Workers Union
Local 473, AFL-CIO
1438 "U" Street, N. W.
Washington 9, D. C.

Re: Your letter dated November 28, 1956.
Mrs. Rachel Brawner

Dear Mr. Palmer:

Pursuant to our telephone conversation; we are reaffirming our comments contained in our letter to you dated November 26, 1956.

Very truly yours,

M & M RESTAURANTS, INC.

DEMcK:mvb

D. E. McKAYE, *President*

30

Exhibit G
[Un. Arb. Ex. 6]

M & M RESTAURANTS, INC.

December 12, 1956

Mr. Oliver T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
Local 473—AFL CIO
1438 "U" Street, N. W.
Washington, D. C.

Dear Mr. Palmer:

Confirming our telephone conversation of today's date we have written the Board of Governors, Naval Gun Factory Cafeterias, Washington 25, D. C. requesting that a meeting be scheduled during the week of January 7-11, 1957 for the purpose of a hearing regarding the denial of admittance to the Naval Gun Factory of Rachel Brawner.

We will confirm the exact date and time as early as possible.

Very truly yours,

M & M RESTAURANTS, INC.

CLAUDE S. BREEDEN, JR.
Assistant Secretary

CSB/b

31

Exhibit G-1
[Un. Arb. Ex. 7]

12 December 1956

From: M & M Restaurants, Inc., Operators Naval Gun
Factory Cafeterias

To: Board of Governors, Naval Gun Factory Cafeterias

Subj: Security Clearance—Rachel Brawner

It is requested that a meeting be arranged during the week January 7-11, 1957, for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner.

It is further requested that in addition to those persons required by your Board and the Naval Gun Factory, Mr. Oliver T. Palmer and one associate be invited to attend this hearing.

M & M RESTAURANTS, INC.

CLAUDE S. BREEDEN, JR.

By direction

CSB/b

32

Exhibit H
[Un. Arb. Ex. 8]

December 17, 1956

Mr. Claude S. Breeden, Jr.

Assistant Secretary

M & M Restaurants, Inc.

8th and M Streets, S. E.

Washington, D. C.

Dear Mr. Breeden:

This will acknowledge receipt of your letter of December 12, 1956 in which you advise us of your request for a meeting to be scheduled during the week of January 7-11, 1957.

relative to the suspension of Mrs. Rachel Brawner on November 15, 1956.

We shall arrange to be present as soon as you notify us of the date of meeting. However, we will highly appreciate it if you will advise us, prior to the date, as to the purpose of the meeting and the procedure to be taken there.

Obviously we must know concerning the purpose and the procedure before we can finally determine the feasibility of participation. It should also be clear that any such participation is without prejudice to existing rights under the collective bargaining agreement.

Very truly yours,

OLIVER T. PALMER
Business Agent

33

Exhibit I

[Un. Arb. Ex. 9]

M & M RESTAURANTS, INC.

January 10, 1957

Mr. Oliver T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
Local 473, AFL-CIO
1438 "U" Street, N. W.
Washington, D. C.

Re: Revocation of security badge issued
to Rachel Brawner

Dear Mr. Palmer:

In reply to our request to the Board of Governors, U. S. Naval Gun Factory Cafeterias relative to a meeting regarding the denial of admittance to the Naval Gun Factory to Rachel Brawner.

We have been informed by the Superintendent, U. S. Naval Gun Factory via the Board of Governors, U. S. Naval Gun Factory Cafeterias, that such a meeting would serve no useful purpose and is therefore unnecessary.

The Superintendent's decision stated that it was considered that the subject cafeteria employee does not meet the security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.

At this point, we would like to state the position of M & M Restaurants, Inc. in this whole matter.

1. We are completely satisfied with the employment record of Rachel Brawner and consider her above average in the discharging of her duties.

2. The operation of the U. S. Naval Gun Factory food service by M & M Restaurants, Inc. is controlled by the Board of Governors, U. S. Naval Gun Factory Cafeterias. As a matter of proper business procedure a contract exists between M & M and the Board for the operation of the above mentioned food services. Contained in this contract are certain provisions which we feel you should be aware of:

(a) In no event shall the Concessionaire engage, or continue to engage, for operations under this agreement, personnel who fail to meet the security requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity.

34 (b) Any dispute concerning a question of fact arising between the Board and the Concessionaire under this Agreement which is not disposed of by mutual agreement shall be decided by the Commanding Officer of the Activity, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Concessionaire. The decision of the Commanding Officer shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent or capri-

cious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence.

3. We feel that M & M Restaurants, Inc. has exercised every means available to them in bringing about a solution of this matter satisfactory to all concerned. The decision given by the Commanding Officer of the Naval Gun Factory must be accepted by M & M as the highest authoritative ruling available in this Activity.

In summation we would like to call your attention again that all personnel employed within the Naval Gun Factory must meet the security requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity. The Security Officer, not M & M, has established the security requirements and M & M is unable to state what composes these security requirements. For example, if M & M were to employ an individual to work in the cafeterias and when the individual applied to the Security Officer for permission to enter and leave the activity in the course of his normal duties, the Security Officer denied this permission then M & M would have no recourse but to terminate the individual. The security of the Naval Gun Factory is established and maintained by the activity and M & M Restaurants, Inc. must comply with existing regulations or else be required to withdraw from the activity.

Very truly yours,

M & M RESTAURANTS, INC.

CLAUDE S. BREEDEN, JR.
Assistant Secretary

CSB:mvb

Exhibit J
[Un. Arb. Ex. 10]

January 11, 1957

M & M Restaurants, Inc.
Naval Gun Factory Cafeterias
Eighth and M Streets, S. E.
Washington 25, D. C.

Attention: Mr. Claude S. Breeden, Jr.
Assistant Secretary

Dear Mr. Breeden:

We have your letter of January 10 concerning Rachel Brawner.

The parties have failed to reach agreement in connection with her discharge. Our Union accordingly requests that the dispute be referred to a Board of Arbitration pursuant to Paragraph 24 of the collective bargaining agreement between the parties. It is our position that Mrs. Brawner has been discharged without good and sufficient cause.

Our Union designates as its arbitrator on the Board Mr. Samuel H. Jaffee, 912 Dupont Circle Building, N. W., Washington 6, D. C.

Please acknowledge, and advise us who will act as the Company's designee on the Board and have said designee contact Mr. Jaffee for the purpose of selecting the third member of the Board of Arbitration.

Very truly yours,

OLIVER T. PALMER
Business Agent

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Exhibit K
[Un. Arb. Ex. 11]

M & M RESTAURANTS, INC.

January 16, 1957

Mr. Oliver T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
Local 473, AFL-CIO
1438 "U" Street, N. W.
Washington 9, D. C.

Dear Mr. Palmer:

This will acknowledge receipt of your letter dated January 11, 1957 relative to the formation of a Board of Arbitration pursuant to Paragraph 24 of the collective bargaining agreement between M & M Restaurants, Inc. and Cafeteria and Restaurant Workers Union, Local 473, for further discussions in the Rachel Brawner matter.

The Company designates as its arbitrator on the Board Mr. Vinton E. Lee, Investment Building, N. W., Washington, D. C.

Very truly yours,

M & M RESTAURANTS, INC.

CLAUDE S. BREEDEN, JR.
Assistant Secretary

CC: Mr. Lee

CSB:myb

Exhibit M

[Un. Arb. Ex. 12]

JAFFEE & DUNAU

912 Dupont Circle Building, N. W.

Washington 6, D. C.

COPY

January 30, 1957

Superintendent
Naval Gun Factory
M & Eighth Streets, S. E.
Washington, D. C.

Dear Sir:

This office represents Local Union No. 473, Cafeteria and Restaurant Workers Union, AFL-CIO. This Union has a collective bargaining agreement with M & M Restaurants, Inc., which operates the cafeteria facilities at your installation.

We are informed that on November 15, 1956, Mrs. Rachel Brawner, an employee of M & M Restaurants, Inc. at the Naval Gun Factory cafeteria and a member of the Union, was discharged by the employer because you or your security officer determined that Mrs. Brawner did not meet security requirements. As presently advised, we have been unable to ascertain under what authority, and in accordance with what procedure, that security determination was made. Would you therefore be good enough to apprise me of the statute, executive order, departmental regulation, and/or other basis pursuant to which this determination was made?

Would you also be good enough to furnish me with a copy of each source of authority upon which you rely, or give me a sufficiently full citation to it so that I may be able to obtain it elsewhere.

May I thank you now for your cooperation in this matter.

Very truly yours,

/s/ BERNARD DUNAU

D/c

39

Exhibit N
[Un. Arb. Ex. 13]

U. S. NAVAL GUN FACTORY
Washington 25, D. C.

In reply refer to
A8-7
180:LJT:adm
Serial 0203

Feb 27, 1957

Jaffee and Dunau
912 Dupont Circle Building, N. W.
Washington 6, D. C.

Gentlemen:

Your recent letter requested information regarding the determination made by the U. S. Naval Gun Factory concerning Mrs. Rachel Brawner, an employee of the M & M Restaurants, Inc.

The written agreement entered into by the Board of Governors, U. S. Naval Gun Factory Cafeterias and M & M Restaurants, Inc. on 1 October 1955 specifies that the employees of the M & M Restaurants, Inc. who work in the Naval Gun Factory Cafeterias must meet the basic security requirements as regards entrance to the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked.

A copy of the agreement form used in connection with the contracting for a food services concessionaire is enclosed. Your attention is invited to paragraph 5 (b) (iii).

Sincerely yours,

/s/ D. M. TYREE
D. M. Tyree
Rear Admiral, USN
Superintendent
Naval Gun Factory

Encl.

40

Exhibit O
[Un. Arb. Ex. 14]

JAFFEE & DUNAU
912 Dupont Circle Building, N. W.
Washington 6, D. C.

C O P Y

April 17, 1957

Admiral D. M. Tyree
Rear Admiral, United States Navy
Superintendent
Naval Gun Factory
Washington 25, D. C.

Re: An arbitration between M & M Restaurants Inc. and Local Union No. 473, United Cafeteria and Restaurant Workers, pertaining to the discharge of Mrs. Rachel Brawner

Dear Sir:

This letter is written to you on behalf of Local Union No. 473, United Cafeteria and Restaurant Workers Union, AFL-CIO, with respect to the above entitled matter.

You will please take notice that at 10:00 a.m., Thursday May 2, 1957, at the offices of the American Arbitration Association, 929 Pennsylvania Building, 425 Thirteenth Street, N. W., Washington 4, D. C., an arbitration hearing will be held before Judge Nathan Cayton pursuant to the collective bargaining agreement between M & M Restaurants, Inc. and Local Union No. 473 to arbitrate the question whether M & M Restaurants, Inc. discharged Mrs. Rachel Brawner on November 15, 1956 "without good and sufficient cause."

You are invited, personally or by a representative, to attend the hearing to state your position and present evidence in its support relevant to your part, or that of your subordinates, in causing Mrs. Brawner's discharge.

Very truly yours,

/s/ BERNARD DUNAU

D/c

42

Exhibit P

AMERICAN ARBITRATION ASSOCIATION
VOLUNTARY LABOR ARBITRATION TRIBUNAL

In the Matter of:

A dispute between M & M RESTAURANTS, INC., and one of its former employees, Rachel Marie Brawner, represented by Cafeteria and Restaurant Workers Union, Local 473 AFL-CIO.

Offices of American Arbitration
Association, Pennsylvania
Building, Washington, D. C.,
Thursday, May 2, 1957.

The above entitled matter came on for hearing at 10:00 o'clock a.m., before the Arbitration Panel.

MEMBERS OF THE ARBITRATION PANEL:

NATHAN CAYTON, Esq., Chairman

SAMUEL H. JAFFEE, Esq., for the Union

JOHN B. CULLEN, Esq., for the Company.

APPEARANCES:

BERNARD DUNAU, Esq., appearing for the Union.

Mr. D. E. MCKAYE, President, M & M Restaurants, Inc.,
and Mr. HAROLD R. BAKER, Supervisor of M & M
Restaurants, Inc., appearing for the Company.

44 The Chairman: Mr. Baker, you are the Supervisor of the M & M Restaurants?

45 Mr. Baker: I supervise all the restaurants or

cafeterias within the Naval Gun Factory.

The Chairman: How many are there?

Mr. Baker: There are three main cafeterias.

The Chairman: Which one are we dealing with?

Mr. Baker: We are dealing here with the Bellevue Annex Cafeteria.

The Chairman: Mrs. Brawner worked there for some six years approximately?

Mr. Baker: That is right.

The Chairman: You have heard the statement of Mr. Dunau that her competence was not in question, have you?

Mr. Baker: Yes, sir.

The Chairman: Will you tell us what happened in connection with her leaving the Company, and with what has been called her discharge?

OPENING STATEMENT ON BEHALF OF COMPANY

Mr. Baker: On the day before the date in question.

Mr. Jaffee: November 14th?

Mr. Baker: November 14th, I received a call from the office of the Board of Governors, who have direct control of the cafeterias.

The Chairman: I don't want to keep interrupting you but I want a clear picture of all the people in official positions. The Board of Governors are civilian employees or military?

Mr. Baker: In this case they are a civilian board.

The Chairman: All employed by the Naval Gun Factory?

Mr. Baker: All employed by the Naval Gun Factory. They are Government employees.

Mr. Cullen: You have a contract with the Naval Gun Factory, allowing you to conduct the business of the cafeterias?

Mr. Baker: Yes, sir.

46 Mr. Cullen: That contract is signed by the Board of Governors, is that correct?

Mr. Baker: That is correct. The Superintendent of the Naval Gun Factory appoints the Board of Governors to represent him and carry out the operation.

The Chairman: Who appoints them?

Mr. Baker: The superintendent of the Naval Gun Factory.

Mr. Baker: On the 14th of November I received a call from Mr. Pyles, who is Secretary-Treasurer of the Board of Governors, and he told me that he was forwarding a letter to our office, directing us to have Rachel Brawner turn in her badge—that is her identification badge—which admitted her to the Naval Gun Factory; that there was a

question of security clearance, and that the Security Officer was no longer going to let her have the badge.

He directed me to get the badge and turn it over to the Security Officer the next day.

Mr. Baker: The next morning, then, I called Mrs. Brawner and asked her would she come up to my office and see me. So when she came in, I told her what had happened, that is, as much as I knew about it, that I was directed to take the badge from her and return it to the Security Officer, and that is what I did, and she turned it over to me.

The Chairman: Do all the employees of the cafeterias have badges?

Mr. Baker: Yes, sir.

The Chairman: Those badges enable them to get into the job?

Mr. Baker: That's right.

The Chairman: Do they have to show their badge in order to go out?

Mr. Baker: That is right. It is an identification badge.

47 The Chairman: What conversation did you have with her?

Mr. Baker: Of course, Mrs. Brawner was very upset, and of course she was surprised that such a thing would come up, as we all were. She asked me what she could do. I told her, if I were in her position. I would advise her to go immediately to the Security Officer and make a personal appeal to him as to what was happening in her case, and that that would be the normal thing to do, because I could not get any more information and I did not know any more about it; but I had been directed through Mr. Pyles to secure her badge and turn it back to the Security Officer, because they would no longer permit her to have security clearance.

I told her if she could not get any information on the situation from the Security Officer, that she had a right

to go to the Superintendent of the Naval Gun Factory, who is the highest authority, and to try to get some further information there.

* * *

The Chairman: Will all who are going to testify stand and raise their hands and be sworn?

(The following witnesses were sworn by the Chairman en banc:

Rachel Marie Brawner
Oliver T. Palmer
Denver McKaye
Harold R. Baker
Claude S. Breeden, Jr.)

48 The Chairman: I take it that the statement that you have just made, Mr. Baker, is true?

* * *

Mr. Baker: Yes, sir.

51 Mr. Dunau: I should like to ask whether there is anyone here from the office of the Superintendent of the Naval Gun Factory?

(No response.)

* * *

Rachel Marie Brawner,

was called as a witness by and on behalf of the Union, being previously sworn by the Chairman, was examined and testified as follows:

Direct Examination

* * *

By Mr. Dunau:

Q. Where do you live, Mrs. Brawner? A. 2342 Pomeroy Road, S. E.

Q. How old are you, Mrs. Brawner? A. 38.

Q. Are you married? A. Yes.

Q. Do you live with your husband? A. Yes.

Q. How many children do you have? A. Nine.

52 The Chairman: How many?

The Witness: Nine.

By Mr. Dunau:

Q. What date were you discharged by the M & M Restaurants, Inc. A. November 15, 1956.

Q. Before you were discharged, how long had you worked for them? A. Six and one-half years.

Q. Where was the cafeteria located at which you worked?
A. It was at Chesapeake and Overlook Drive.

Q. Does that location have another name, Mrs. Brawner?
A. Yes, Bellevue Annex.

Q. Are there a number of buildings in that annex? A. Yes.

Q. In what building is the restaurant located? A. Building 65.

Q. Is most of that building devoted to the cafeteria?
A. Yes.

Q. What else is in that building? A. They have two offices inside.

Q. Do you know what goes on in those offices? A. No.

Q. What days of the week did you work, Mrs. Brawner?
A. Monday through Friday.

Q. What were the hours of the day? A. 6:00 to 3:00.

Q. What was your job classification? A. Short order cook.

Q. Is there another name that that classification goes by? A. Breakfast cook.

Q. What was your hourly rate of pay? A. \$1.18.

Q. At the cafeteria was there any other full-time employee who worked there with you?

53 A. Yes.

Q. What is her name? A. Mrs. Callahan.

Q. What is her job? A. Cashier.

Q. Did she sometimes do other work? A. Yes.

Q. What did she do? A. Sometimes she served coffee and cut pies.

Q. When you arrived for work at 6:00 in the morning, will you tell us what you did? A. First I would get my food out that I was going to have for breakfast, the eggs, bacon, sausage, meat, and prepare my pancakes, if I was going to have hot cakes, and mix the dough, and I would get my potatoes ready.

Q. Then what did you do after you had prepared to serve breakfast? A. I set up my grill and waited for my customers.

Q. At what time was breakfast service through? A. About 8:00 o'clock.

Q. After breakfast service was through then what did you do? A. Cleared my tables in the dining room, and washed

the dishes, and prepared for lunch.

Q. About what time was lunch service started? A. About 11:30.

Q. At about what time was lunch service through? A. 12:30.

Q. After you were through serving lunch, what did you do? A. Cleaned up, and most of the time prepared for the next morning, what I was going to have for breakfast, and if I was going to have potatoes, I would try to peel them, to have them ready for the next morning.

54 Q. After you had finished preparing whatever you could for the next morning's breakfast service, would you then go home? A. Yes.

Q. Mrs. Brawner, does this restaurant operate cafeteria style? A. Yes.

Q. Did you run the steam table at the cafeteria? A. Yes.

Q. Is this a busy restaurant? A. Yes, sir.

Q. Would you tell us about how fast the line moves in the restaurant? A. As soon as they pick up some thing, they go on.

. . .

That's all.

. . .

Q. Did you go into other buildings at the Annex? A. No.

. . .

Q. You were discharged, you say, on November 15, 1956? A. Yes, sir.

Q. Would you tell us what happened on that day? A. That morning I started to work as usual, and I had served the breakfast and was preparing my breakfast and Mrs. Callahan's, and Herbert come up.

Q. Who is Herbert? A. He is a truckdriver, and brought Hannah Cook with

. . .

55 Q. Who is Hannah Cook? A. She is another worker, and told me Mr. Baker wanted to see me, and to come to his office, and to have Hannah to work in my place.

Q. Who is Mr. Baker, Mrs. Brawner? A. Mr. Baker was my supervisor.

Q. All right. A. And I got my things out of my locker and told Hannah where to get different things to prepare for lunch, and what I had to serve, and where to find them, and I went with her over to Mr. Baker's office.

Q. When you got to Mr. Baker's office, did you see Mr. Baker? A. Yes.

Q. Would you tell us what conversation you had with Mr. Baker? A. Well, when I first went in, I sat down and Mr. Baker told me that he was sorry, that he had been told to pick up my badge, and I asked Mr. Baker what for, and he said: "For security reasons."

I said: "What about security? I haven't did anything. I don't know anything that I did."

And he said: "That's all I know, to pick up your badge."

I said: "What must I do or who do I see?"

He said: "Write a letter to the Superintendent of the Yard." and he said: "I would"—well, he said if he were me, he would write a letter to the superintendent.

Q. Was anything further said? A. No. I turned my badge over to Mr. Baker, and he asked the clerk to write me a slip of paper to get out the gate, so that I could show it to the Marine on the gate?

Q. After you left the grounds, what did you do then? A. I thought I would go see Mr. Palmer.

Q. Mr. Palmer is the business agent of the local? A. Yes.

Q. Did you report to Mr. Palmer what happened?

56 A. Yes, I did. I told Mr. Palmer what had happened at the yard. Mr. Baker told me before it was something which happened in 1946. That is what Mr. Baker said. I was so upset I didn't know nothing, so when I got to the office Mr. Palmer asked me what had happened, and I told him, and I told him that it was something which had happened in 1946, and I couldn't remember, and Mr. Palmer asked me to check over in my mind. Had I ever been to any parties or ever subscribed to any magazines or papers or anything, and I told him that I got the Readers Digest, and he asked me had I ever been to any parties, and I said yes I had been to parties.

He said, had I ever saw the Daily Worker, and I

said I had, and he said: "With who?"

I said: "With one of the girls who worked with me at Lansburgh's."

Q. When did you work for Lansburgh's? A. That was in 1946.

Q. In 1946? A. Yes, sir.

Q. What did you see in connection with the Daily Worker at Lansburgh's in 1946? A. I can't remember all that I saw in the paper but it was a regular newspaper to me.

Q. Did you see the paper in the possession of an employee at Lansburgh's? A. Yes, sir.

Q. What was the employee's name? A. Gladys Felder.

Q. Did you know anything else than that the employee, Gladys Felder, had the Daily Worker in her hand? A. No.

Q. Did you know if Gladys Felder was a Communist? A. No.

Q. Do you know whether she is a Communist? A. I do not.

Q. Did Gladys Felder ever ask you to engage in Communist activity?

57 A. No, sir.

Q. Did she ever ask you to join the Party? A. No.

Q. Did she ever discuss Communism? A. No.

Q. Do you know anything about Gladys Felder other than that you saw her one day with a Daily Worker in her hand? A. No, I don't.

Q. Did you at the time you saw Mrs. Felder with the Daily Worker know what it was? A. No, I didn't.

Q. What did you think it was? A. I tell you I thought it was a paper, something like a Union would put out, so far as the workers are concerned. That's what I thought it was.

Q. When did you first learn that the Daily Worker was a Communist newspaper? A. When I read in the paper about the Rosenbergs case, I saw something written up about the Daily Worker, and it came to me it was a Communist paper.

Mr. Jaffee: Are those the Rosenbergs who were executed some time later?

The Witness: Yes, sir.

By Mr. Dunau:

Q. Mrs. Brawner, what do you read? A. Well, I read Good Housekeeping and I read Readers Digest, and I belong to the Condensed Book Club, and I get them every month.

Mr. Jaffee: Is that the Condensed Book Club put out by Readers Digest?

The Witness: Yes, sir, and I get Better Homes and Gardens and the Watchtower.

Mr. Jaffee: Is that Jehovah's Witnesses newspaper?

The Witness: Yes, sir.

By Mr. Dunau:

Q. Mrs. Brawner, do you read any daily newspapers? A. Yes.

Q. Which daily newspapers do you read? A. The News and the Star.

Q. Do you read the Washington Post? A. I don't get it.

Q. Mrs. Brawner, do you belong to a church? A. Yes.

Q. What church do you belong to? A. John Stewart Memorial.

Q. What religious denomination is it? A. Methodist.

Q. Do you attend church regularly?

• • •

A. Yes, sir.

Mr. Dunau: I have no further questions.

The Chairman: What has been the extent of your schooling?

The Witness: Do you mean how far did I go in school?

The Chairman: Yes.

The Witness: To the eleventh grade.

The Chairman: Here in Washington?

The Witness: Yes, sir.

The Chairman: How long have you lived in Washington?

The Witness: Since I was about three, I suppose. I don't remember coming here.

• • •

By Mr. Dunau:

Q. Mrs. Brawner, what political party do you favor?

A. The Democratic Party.

• • •

59

Oliver T. Palmer.

was called as a witness by and on behalf of the Union, having been previously duly sworn by said Chairman, was examined, and testified as follows:

Direct Examination.

The Chairman: Give your full name, please.

The Witness: Oliver T. Palmer.

By Mr. Dunau:

Q. Where do you live, Mr. Palmer? A. 1829-13th Street, N. W., Washington, D. C., Apartment 303.

Q. What is your position with the Union? A. I am the Business Agent of the Union.

The Chairman: For how long, Mr. Palmer?

The Witness: I have been with the Union twenty years, but I have been Business Agent for the Union since 1943, fourteen years.

By Mr. Dunau:

Q. Mr. Palmer, you have seen, have you not, Union's Exhibits Nos. 2 through 11? A. I have.

• - • • •

Q. Do they represent the substance of the Union's processing with the M & M Restaurants in this case? A. They do.

Q. Did you speak to Mr. McKaye, the President of M & M Restaurants, Inc., on November 20, 1956? A. I did.

Q. Where did that conversation take place? A. It was in Mr. McKaye's office at the Naval Gun Factory.

Q. Would you describe what that conversation was, please? A. After Mrs. Brawner's discharge, we contacted

Mr. McKaye by telephone and advised him we would like to discuss the matter with him, and we went down
60 and he did receive us, and we did have a discussion about it.

Mr. Jaffee: May I interrupt? You say "we." Who is "we"?

The Witness: Mr. Bea and I.

Mr. Jaffee: What is his position?

The Witness: He is President of the Union.

The Witness: We went down and had a discussion about it, and we were trying to find out what information we could get as to the discharge. We pointed out that under the terms of the contract that certainly we would like to

have some information as to why Mrs. Brawner was discharged or was dismissed.

The only information that we were given was that they were advised by letter to take Mrs. Brawner's badge, and that had been done.

We said to McKaye: "We feel that under the terms of the contract that certainly the Company should at least give some reason or point out why, because it is all blank verse to us and we do not know anything."

Mr. Jaffee: Do you mean Paragraph 6 of the contract?

The Witness: Paragraph 6 of the contract, which was then in existence between us.

Mr. McKaye said he could not give us any information concerning it. We requested that some meeting be held so that we could ascertain. We made it clear to Mr. McKaye and his associates that certainly if there was anything established to substantiate that Mrs. Brawner had done anything which was subversive, that we were just as much interested at the Union as they were, and that if we could get some information of any kind which substantiated it, that we would be just as anxious to get Mrs.

Browner out of the Union as they or as the Government was to get her out of the yard.

It developed and we stated to them that we thought:

it was their obligation, as the employer, and as a party to the contract, to give that kind of information to us or to seek to secure it.

Mr. McKaye said that they were in no position to seek anything, and that was all that was said. That is the sum and substance of it.

61 We pointed out that we had had other cases where employees were dismissed for security reasons, and we were given some information, and the employee was at least given an opportunity to defend herself. We said at least Mrs. Browner should be entitled to a fair hearing or something should be done.

Then I left it with them to make every effort to try to see that that was done.

By Mr. Dunau:

Q. Mr. Palmer, you mentioned a meeting in your testimony. With whom was that meeting held, or to be held? You mentioned that you suggested to Mr. McKaye that a meeting should be held. A. With the Board of Governors. Mr. McKaye mentioned that they had received that letter from the Board of Governors, and we were very insistent upon it, that some meeting with the Board of Governors or with the authorities in the Navy Yard be held so that we could try to get some information as to why she was dismissed and why her security

clearance was discontinued.

Q. Was any such meeting ever held? A. It was never held.

Following that conference, when we didn't seem to get any definite information that would lead us to believe or

think that anything could be done, we then wrote a letter on November 20th, protesting her discharge.

Mr. Cullen: Didn't the M & M Restaurants attempt to set up that conference?

The Witness: Later on. They did write us a letter. They wrote us a letter and answered our letter, and when they answered our letter they indicated in that letter that there was an attempt to be made to set up the conference, and they sent us excerpts of the contract.

Then we replied to that letter and requested a copy of the operating contract, but we never received that, and we have never received it, other than it being introduced here today. We have never seen the contract.

62 Then after that Mr. McKaye had to go away on a vacation, I believe, and he went away on his vacation, and then we communicated with Mr. Breeden. After telephone conversations there was an agreement to our request for a meeting to be held. We replied to what they had sent us with a formal statement, and they said that they would attempt to arrange such a meeting in the week of January 7,

1957, I believe.

We replied, and evidenced our desire and agreement to attend such a meeting and to participate in it.

Later on, I believe January 10th, we received a letter that the meeting would not be held.

By Mr. Dunau:

Q. Mr. Palmer, prior to the correspondence in this case, had you known of any provision in an agreement between the Restaurant and the Board of Governors, pertaining to the discharge of an employee for failure to meet clearance requirements? A. That was our first knowledge of any such provision.

Q. Prior to the time I showed it to you in my office, had you ever seen a copy of the agreement between the M & M

Restaurants, Inc., and the Board of Governors? A. I had never seen it, and no one connected with our Union had ever seen it.

Q. Had you ever known it existed? A. I did not.

Mr. Cullen: May I ask, Mr. Palmer, did you know at the time that all the employees were required to have a badge to enter the Navy Yard?

The Witness: We did know that.

Mr. Cullen: That is given by the Navy Yard and not the restaurant, is that correct?

The Witness: We never knew how the badges were secured, Mr.—is it Mr. Cullen?

Mr. Cullen: Yes, sir.

63. The Witness: We never knew how to secure them.

The Chairman: You personally don't have a badge?

The Witness: I personally don't have a badge. When we go to the Navy Yard, we have to go through the office, and they call Mr. McKaye's office, and they give us a pass.

Mr. McKaye: So do I.

The Witness: When we send somebody there, the Company, as we understand it, secures a badge for them. That is to the best of our knowledge.

By Mr. Dunau:

Q. Mr. Palmer, how long has the Union been recognized as the bargaining agent for M & M Restaurants, Inc.?
A. The Union was certified as collective bargaining agent as a result of an election conducted on July 15, 1942.

Q. An election conducted by whom? A. The National Labor Relations Board.

Q. Were you thereafter certified by the National Labor Relations Board? A. We were.

Q. Do you recall the date of the certification? A. To the best of my recollection, in 1942. You generally get certification within ten days, and I believe

it was within ten days or two weeks.

Q. Who was operating the cafeterias at the Naval Gun Factory at the time of certification? A. At the time of certification the operation at that time was by Miss H. K. Dickson.

Q. Did you have agreements with Miss Dickson? A. Yes, sir, we did.

Q. collective bargaining agreements? A. Collective bargaining agreements.

Q. When did M & M Restaurants take over from Miss Dickson? A. M & M took over in March of 1947. I believe that is the correct date.

Q. Have you had any collective bargaining agreements with M & M Restaurants since that date? A. We have.

Q. Did each of the agreements which you had with M & M contain the provision that employees should not be discharged except for good and sufficient cause? A. They did.

Q. Has the agreement which is in evidence in this case since expired? A. It has.

Q. Have you consummated another agreement with M & M? A. We have.

Q. Has it been executed yet? A. Not as yet.

Q. I notice the agreement in evidence as Union's Exhibit No. 1 lists the Union as Local 471. Will you explain how the designation "471" was changed to "473"? A. The designation of the Union was changed in January 1956. Our Union at that time was an independent Union, when the last agreement referred to was consummated. Since then, in January 1956, we affiliated with the Hotel and Restaurant Employees and Bartenders International Union, which is an international union, and we were unable to keep No. 471 because another local union had No. 471, so we had to take the nearest to it, and 473 was the nearest to it, and we chose the No. 473.

Mr. Jaffee: That is a part of the AFofL-CIO?

The Witness: That is a part of the United Labor Movement, AFofL-CIO.

By Mr. Dunau:

Q. Mr. Palmer, except for the affiliation with the AFofL-CIO, was there any change effected in the Union in January 1956? Is it the same Union? A. It is the same Union.

Q. Has the Union and M & M Restaurants, Inc., continued to operate under this contract since the affiliation?

A. We have.

Q. Mr. Palmer, how many employees does the
65 Union represent in the District of Columbia area?

A. Approximately 2,600.

Q. With what type of employers do you have collective bargaining agreements? A. We have collective bargaining agreements with the major operators of all Government cafeterias, Government Services, Incorporated, being the largest operator. The Pentagon, which is operated by the Knott Catering Corporation, and prior to the Knott Catering Corporation, which was the operator since October 1, 1956 of the Pentagon, and prior to that it was the National Food Corporation, and we had an agreement with the National Food Corporation since March 1944.

The Witness: We have contracts with the Welfare and Recreation Association of the United States Department of Agriculture, and they operate the Agriculture cafeterias at Log Lodge at the plant in Maryland which is in the vicinity of Laurel, Maryland, and we represent commercial cafeterias.

We represent the employees of the S & W Cafeteria, Allies Inn, the Greystone Cafeteria, the Chamberlin Cafeteria, and the maintenance and cafeteria employees of

the YWCA at 17th and K Streets, N. W.; the Methodist Cafeteria, which is at 100 Maryland Avenue, N. E.; the Latch String Cafeteria, 612-12th Street, N. W.; and also the employees of Kann's Luncheonette, in the department store.

Q. Mr. Palmer, can you give us an approximation of the percentage of employees that work in Government cafeterias and what percentage work in the commercial restaurants, the percentage of the people referred to? A. Percentagewise, in the Government cafeterias we represent approximately 2,000 workers.

Q. Then, as I understand it— A. The bulk of our membership is in the Government cafeterias.

Q. I believe you said you represented 2,600 employees?

A. That is correct.

66 Q. So about 600 would be employed in commercial restaurants? A. That's right.

Q. That is restaurants which are not operated as Governmental cafeterias? A. That is right.

Q. Would you tell me whether an employee who has

. . .

been discharged as a security risk from one Governmental cafeteria would be able to obtain employment in another Governmental cafeteria? A. An employee who may be discharged as a security risk has not a ghost of a chance of getting a job in a Government cafeteria, and it is very difficult to obtain employment for any employee who has that tag on them, in any cafeteria. That is a problem, and if they have that tag, it is almost impossible to find them another job.

Q. Mr. Palmer, do you know an employee named Esther Mae Thompson? A. I do.

Q. Where does Esther Mae Thompson work? A. She works on the beverage bar at the Department of Defense. That is one of the beverage bars which is operated in the Pentagon Building by the Knott Catering Corporation.

Q. Had the employee been discharged—you say it is

operated by the Knott Catering Corporation? A. Yes, sir.

Q. And who was the predecessor of the Knott Catering Corporation? A. The National Food Corporation was the predecessor.

Q. Was the National Food Corporation required to discharge this employee by the Security Officer at the Pentagon as a security risk?

A. The Company was required to dismiss her.

Q. Was that dismissal arbitrated? A. It was.

Q. Did the arbitration result in an award requiring that the employee be put back to work? A. The award was handed down on May 17, 1955, to the best of my recollection, and the award of the Arbitrator was that she be reinstated in her job, with full back pay.

67 Q. Was she reinstated pursuant to that award?

A. She was.

Q. Is she still working at the Pentagon? A. She is still working at the Pentagon.

Mr. Jaffee: Did she get the back pay, too?

The Witness: She did get the back pay.

The Chairman: How long ago was it, Mr. Palmer?

The Witness: Your Honor, she was dismissed on August 9, 1954, and the case was heard, I believe, in April of 1955, and the award was made May 17, 1955. I believe that is correct. That may not be just exactly correct but I believe it is almost correct.

Mr. Cullen: Was she required to have a badge?

The Witness: At certain times they are.

Mr. Cullen: How did she get the badge back?

The Witness: At certain times they are required to have badges and there are certain employees who during

certain hours of the day do not have badges, but all the employees who work there have to have passes. They gave

her her pass. Every employee who works there has to have a pass, and it is one of the strict security regulations.

Mr. Cullen: What I am trying to find out is, how did they, as the result of an arbitration award, compel the Government agency to readmit her?

The Witness: Mr. Cullen, I could only reply to you that she was reinstated and her pass was restored. That is the only answer I could give.

Mr. McKaye: Make the date September 1946 that we took over the cafeteria.

68 By Mr. Dunau:

Q. Mr. Palmer, in a restaurant which is run cafeteria style, how many customers pass through the line per minute ordinarily?

A. Well, the ratio which they expect in Government cafeterias is generally six to the minute.

Q. About six to the minute? A. Yes, sir. If the line is not going—Sometimes they get seven or eight through, but at least six.

The Chairman: Mr. Palmer, you just told us about the case of Esther Mae Thompson.

The Witness: Yes, sir.

The Chairman: Earlier you told us there had been other instances like this, either in this Union or in the Gun Factory.

The Witness: Maybe you misunderstood.

The Chairman: Were the discharges, as you call them, for security reasons?

The Witness: I said in my recollection that was the one particular instance.

The Chairman: Is that the only one you remember?

The Witness: This is in fact the second one we have had.

The Chairman: Then there was the National Food case and this one?

The Witness: Only these two.

The Chairman: Aside from this one, you have no

knowledge of any other discharges for security reasons?

The Witness: No, these are the only two, the one that I mentioned, Mrs. Thompson, and this one.

Mr. Jaffee: If there were others, is the nature of your work with the Union such that you would know about them?

The Witness: Most assuredly so.

The Chairman: There would not be any discharges or separations except those which you would know about?

69 The Witness: That is precisely correct.

Mr. Cullen. In your conference with Mr. McKaye, Mr. Palmer, did he tell you exactly what had happened, that is, that he had had to pick up the badge?

The Witness: He related it to us.

Mr. Cullen: Did he tell you that he was dissatisfied with Mrs. Brawner's work at all?

The Witness: He did not.

Mr. Cullen: Did he tell you at that time that if she could get the badge back, she could have her job back?

The Witness: Naturally, if he was not dissatisfied, he would employ her in that case.

Mr. Cullen: You knew that, in other words?

The Witness: I accepted that as a foregone conclusion.

Mr. Cullen: The only thing preventing her from working was her inability to get or to have a badge?

The Witness: Mr. Cullen, from our point of view, our contention was that in order to constitute good and sufficient cause, the provision of the contract was such that there was a sanctity to that provision, and there was a

responsibility on both parties as parties to that contract, when these things occur, to at least see that an employee gets a fair hearing, and that was all we were contending.

Mr. Cullen: Did you tell us that they were getting a hearing from the Board of Governors?

70 The Witness: According to the communication which we had, but unlike in the Department of Defense, where we had some information on which to proceed, they didn't just

say to Miss Thompson: "We have to take your pass. Give us your pass," but they gave a memorandum on the situation, a memorandum of particulars, so to speak.

Mr. Cullen: Didn't Mr. McKaye or Mr. Breeden tell you that they had no information other than that they were told to pick up the badge, and they couldn't give you any reasons? Didn't they tell you that?

The Witness: They told us that, and that is all we knew.

75 Mr. Cullen: Mr. Baker, do you have the original letter from the Board of Governors, requesting you to pick up this badge?

Mr. Cullen: That is the letter saying what was done. Do you have the letter from the Board of Governors?

You stated before, Mr. Baker, that you received a telephone call.

Mr. Baker: Yes, sir.

Mr. Cullen: And also that he was writing a letter to you.

Mr. Baker: That's right.

Mr. Cullen: Do you have that letter?

Mr. Baker: This letter is addressed to M & M Restaurants, being dated the 16th of November.

Mr. Cullen: That tells what was done, and that also includes in it the fact that you did pick it up?

Mr. Baker: That is right.

Mr. Cullen: Did you ever receive a letter from them?

Mr. Baker: Maybe I misunderstood you, or I said it in the wrong way. Mr. Pyles told me the direction he had received from the Security Officer, and he said he would follow with a letter written to us, and he would substantiate what he was telling me.

76 The Chairman: Did he follow with such a letter?

Mr. Baker: This is the letter here.

The Chairman: The first notice was November 14th?

Mr. Baker: Yes, sir.

The Chairman: By telephone?

Mr. Baker: Yes, sir.

The Chairman: It was not by letter?

Mr. Baker: No, sir, it was a telephone call.

The Chairman: From whom?

Mr. Baker: From Mr. Pyles, and the reason for the call was this, Your Honor:

The Security Officer had certainly called Mr. Pyles, from the conversation between Mr. Pyles and myself, and he asked me to get the badge, or would the Security Officer be better able to handle it by going down there with security police and getting the badge themselves.

I said: "Certainly, so far as the employee goes,

it would be much less embarrassing to have me handle it," and that if I could, I would do it.

He said: "Suppose you do it, and I'll follow with a letter to you to substantiate what I'm telling you," and that is the way we handled it.

The Chairman: Did Mrs. Brawner surrender the badge to you?

Mr. Baker: Mrs. Brawner surrendered the badge to me.

The Chairman: And you in turn surrendered it to the Security Officer?

Mr. Baker: That is correct, he directed me to take it to the Security Officer.

The Chairman: On the 15th or 16th?

Mr. Baker: The 15th.

The Chairman: 15th of November 1956?

Mr. Baker: Yes, sir.

Mr. Dunau: Since the letter is so short, and we do not have copies of it, I might as well read it into the record.

The Chairman: Very well.

77 Mr. Dunau: This is on the letterhead of the Board of Governors of the Naval Gun Factory cafeterias, U. S. Naval Gun Factory, Washington 25, D. C.

"B.G.:HRP:mar

Ser 0085

16 November 1956

"MEMORANDUM

"From: Board of Governors, Naval Gun Factory Cafeterias

"To: M & M Restaurants, Inc.

"Subj: Rachel Brawner

"1. The Board was notified on the afternoon of November 14, 1956 by LCDR H. C. Williams, Security Officer, Naval Gun Factory, that Rachel Brawner, head steam table employee, presently working at the Bellevue Cafeteria, would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer.

"2. This office immediately contacted Mr. Baker and requested to return the badge. Rachel Brawner's badge was returned to the Security Officer on 15 November 1956.

"H. R. PYLES

Secretary-Treasurer."

The Chairman: We will mark that as Company's Exhibit No. 1.

78 Mr. Dunau: The document which has been marked Company's Exhibit No. 2 reads as follows:

"185:HW:amh

Ser 5437

Jan 8—1957

"From: Superintendent, U.S. Naval Gun Factory

"To: Mr. E. C. Lynch, Chairman, Board of Governors, Naval Gun Factory Cafeterias

"Subj: Rachel Brawner (Cafeteria Employee); revocation of security badge

"Ref: (a) Board of Governors, NGF Cafeterias ltr Ser 0102 of 13 Dec 1956 with 1st End thereto

(b) Agreement for Food Services Concessionaire between Board of Governors, U.S. Naval Gun Factory and M&M Restaurant, Inc. of 1 October 1955 (NavExos 3732 (4-55))

"1. By reference (a), the Chairman of the Board of Governors, Naval Gun Factory Cafeterias, requested that a

meeting be arranged, participants consisting of the Naval Gun Factory Security Officer, members of the Board of Governors, representatives of M&M Restaurants, Inc. and agents of the Restaurant Employees Union to discuss the action relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner, a cafeteria employee.

"2. Paragraph 5(b)iii of reference (b) stipulates that the contractors will employ only those who meet the security requirements for admission to the Naval Gun Factory. It is considered that the subject cafeteria em-

ployee does not meet these security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.

"3. It is considered that the above decision is proper in this case and that the meeting proposed in reference (a) would serve no useful purpose and is therefore unnecessary.

"D. M. TYREE

"Enclosure (1)"

79 The Chairman: You may read the second letter.
Mr. Dunau: The letter marked Company's Exhibit No. 2-A reads as follows:

"BOARD OF GOVERNORS
NAVAL GUN FACTORY CAFETERIAS
U. S. Naval Gun Factory
Washington 25, D. C.
Lincoln 3-0014

"B.G.:HRP:mey
Ser 0002
9 January 1957

"MEMORANDUM

"From: Board of Governors, Naval Gun Factory Cafeterias

"To: M & M Restaurants, Inc.

"Subject: Rachel Brawner, Cafeteria Employee; security clearance for

"Ref: (a) M & M Restaurants, Inc. ltr of 12 Dec 1956 to Bd of Gov

"Encl: (1) Copy of Superintendent's ltr 185/Ser 5437 of 8 Jan 1957 to Bd of Gov

"1. A meeting was requested by reference (a) for the purpose of a hearing relative to the Security Officer with-

drawing the security clearance of one of your employees, Rachel Brawner.

"2. A meeting was requested by the Board of Governors, Naval Gun Factory Cafeterias. The Superintendent, Naval Gun Factory forwarded the answer contained in enclosure (1) which is self explanatory.

"(Signed) T. P. Sarelas

T. P. SARELAS

Vice-Chairman."

Mr. Cullen: Mr. Baker, will you tell us again, please, the conversation which you had with Mrs. Brawner on that morning?

Mr. Baker: Yes, sir. When Rachel arrived in my

office—I think she said the same thing—I told her I was sorry but I had to take such an action in her case, and that I had word through the Security Officer that I would have to take up her badge.

Of course when I told her that, naturally it upset her a great deal. Then she questioned me as to what it was, or what the reason for such an action was. I could not tell her anything except I had been directed to take such an action.

Then I advised her. She asked me what she could do, and, as I say, she was upset, and she asked what she could do, and I tried to explain to her the several steps which I thought might be possible for her to follow, including going to the Security Officer himself, and to the Superintendent, and of course I also told her to see Mr. Palmer, her business agent.

Mr. Cullen: Did the Security Officer give you any reason at all, when he told you to pick up the badge, or were you given any reason?

Mr. Baker: No, I had not talked to the Security Officer prior to getting the badge. I did not talk to him.

Mr. Cullen: Did you ever talk to him after that?

Mr. Baker: After that, I did. When I returned the badge to him.

Mr. Cullen: Did he give any reason for it?

Mr. Baker: No, sir, he did not, except to say that he could not allow her to continue the privilege of having the badge, that her security was in question.

Mr. Cullen: At no time did the Board of Governors or the Security Officer give you any reason for the action?

Mr. Baker: No, sir, they did not explain the reason, other than security.

Mr. Cullen: I will ask you again to back up what Mrs. Brawner said. Her work had been satisfactory?

Mr. Baker: Oh, yes, and I think she asked me at that time—of course it has been several months and I can't recall word for word, but Mrs. Brawner and I discussed it, and I had never had any question about her ability or qualifications, and I pointed that out to her at that time, and there was no question about her work, and she was satisfactory, so far as the Company was concerned, and I told her that I regretted having to do such a thing.

After all, like many of our employees, she had problems at different times, that she would come to me with, and naturally we would come in contact with her throughout the day, at different times, in connection with the work, and I can say we had no question of her ability or qualifications to do the job.

81 Mr. Cullen: If she is able to obtain her badge or

security clearance, she can have her job back?

Mr. Baker: Immediately.

Mr. Cullen: In your discussions with the Board, either through Mr. Pyles, or his assistant, was there anything said to you about the conditions or terms of your contract with the Yard?

Mr. Baker: The only reference which was made to our contract, when Mr. Pyles talked to me on the telephone the day before the action took place with her badge, he told me then that under the contract he was following through on that provision. He said: "If you are going to have a question about it, that will answer your question right there."

Mr. Jaffee: That was the concessions contract?

Mr. Baker: Yes, sir, that's right.

Mr. Cullen: Mr. Breeden, do you have anything to add to help us with regard to these conferences with Mrs. Brawner or anything else.

Mr. Breeden: Nothing except what was relayed to me when Mr. McKaye left, I took over the correspondence and telephone calls with Mr. Palmer, in an attempt to arrange a meeting for clarification of it, and, as Mr. Palmer stated, we were not successful, and we got a ruling from the Superintendent of the Yard, stating his opinion.

82 The Chairman: Mr. Baker, I don't have Mrs. Brawner's exact words but you told her that the question about her security status had something to do with something which happened in 1946. Did you have that conversation with her?

Mr. Baker: When she was in my office, and she was questioning me as to what might be in the background as to security, when we were taking her badge, I told her I had no information other than what I have already stated and I told her I had no idea really and I could not give her anything.

I said: "Of course, when you sign an application for admittance to the Naval Gun Factory, the security checks start at that time."

That is, each employee who is employed by the Gun Factory, or by us, in the screening provision they make an application to the Security Officer for an identification

83 badge.

The Chairman: Is there available to us, or can you make available to us, putting this question generally, a copy of that form of application?

Mr. Baker: Yes, I think it can be made available. The Naval Gun Factory has its forms on hand. Let me say that. They are there.

The Chairman: I will put it this way: Will you attempt to get one for us?

Mr. Baker: Yes, sir.

The Chairman: Have you ever had an instance where an application of that kind had been rejected in advance of employment?

Mr. Baker: Several times.

The Chairman: I mean for security reasons.

Mr. Baker: Not for security reasons. On the application, Your Honor, one part of the application deals with criminal record, and of course it verifies that on one part of the statement, that you shall answer all the questions to the best of your knowledge truthfully. Where it deals with the criminal record it says: "List arrests, if any," and where that has come up and where someone has put down a criminal record, they would not accept them for employment.

Mr. Cullen: Who first brought up the question of 1946?

Mr. Baker: In our discussion with Mrs. Brawner when she was in my office, I referred back to the time when she started with M & M, and came to the Gun Factory, and I think I told her in her security check, it would not necessarily show it started from that day she started with us, but they would go back to her whole history, her whole working time. I do not think I named the date but I think I said they could go back to 1945 or 1946, wherever you had your first job.

In other words, in general conversation I could have

brought up the date 1946 or 1945 in the matter of just talking with her.

Mr. Cullen: You have no knowledge of anything specifically happening to her?

84 Mr. Baker: I have no knowledge of anything relating to her within that time.

The Chairman: Turning now to Mrs. Brawner, I think the question has been put already but let us ask it again:

Have you ever been arrested for any crime in the District of Columbia, or elsewhere?

Mrs. Brawner: No, sir.

• • •

The Chairman: Are you living with your husband?

Mrs. Brawner: Yes, sir.

The Chairman: What is his employment?

Mrs. Brawner: He works at the Bureau of Engraving and Printing.

The Chairman: How long has he worked there?

Mrs. Brawner: About ten years. He has been in the Government seventeen years.

• • •

85 Mr. Cullen: Mrs. Brawner, did you have any conversation, or any personal interview, with anybody in the Yard at the time you got this job?

Mrs. Brawner: Yes, sir.

The Chairman: On the chance that that form may not be made available to us, if everybody is willing, perhaps Mrs. Brawner can reach back in her memory and tell us what the questions were which were put to her.

Do you remember that application, Mrs. Brawner? Not the application of the M & M but the Security Officer application to the Gun Factory?

Mrs. Brawner: I remember once going to the Fifth Floor, and I believe Mr. Baker was with me, and there was another person who went in there, and they took the

fingerprints, but I can't think of all the questions they asked.

86 The Chairman: Did they ask questions verbally?

Mrs. Brawner: Yes, sir.

The Chairman: Was it from a form?

Mrs. Brawner: I don't remember a form but I remember they asked if I had any identification like moles on my face, and they took my fingerprints, but other than that, I don't remember.

The Chairman: You do not remember what the questions were?

Mrs. Brawner: No, sir.

The Chairman: That is, if you did fill-out a form?

Mrs. Brawner: That is right.

The Chairman: Do you remember any questions they asked you dealing with your past security or loyalty record?

Mrs. Brawner: I remember that, yes. I remember, like Mr. Baker said: "Have you ever been arrested for anything?" and I said no, I hadn't.

Mr. Jaffee: Did you answer all the questions truthfully?

Mrs. Brawner: Yes, sir, I didn't have no reason not to.

Mr. Jaffee: I would like to ask Mr. Baker one question.

Since you say Mr. Baker represents M & M, he should know whether she ever did this, and I assume I am safe in saying that so far as Mrs. Brawner's security and loyalty are concerned,—and I think those terms, it should be explained, are being used in their broadest aspect now—you never heard any question about it until this thing arose?

Mr. Baker: None whatsoever.

I might clarify that. On this application we have been referring to, it is a mimeographed form, made up by the Security Officer of the Naval Gun Factory. They screen

two types of employees through the security office. First they screen Government employees, or people who are making application for Government work, and who fill out Government Form 53, and those people use a different form. Form 53 is for a Government employee, on a Civil Service form. The other people going to work in the Naval Gun Factory, like for us in the restaurants or the cafeterias, or the officers' mess, or the Navy Exchange Store—in other words, there are several different types of activities that employ civilians, but are not Government employees, and those people are referred to as non-sponsored employees, and the Naval Gun Factory uses its own paper and processes them on that type of form. It is not a very extensive type of application and has only a few questions relating to general information about the person filling out the form.

Mr. Jaffee: Was Mrs. Brawner a Government employee?

Mr. Baker: She was not.

The Chairman: She was a non-sponsored employee?

Mr. Baker: I got it wrong. It is a sponsored employee. They used to call them "non-Government," and now it is "sponsored."

The Chairman: A sponsored employee is somebody like Mrs. Brawner, who works for an organization like yours, within a Government area?

Mr. Baker: Yes, sir, and the form was concerned

with the address, relatives living within this country, and relatives living abroad, military service, if any, and police service, if any, and to list the names of clubs, fraternities or organizations of which you might be a member. It is a very small form.

Mr. Cullen: May I ask Mr. McKaye, so far as you know, do those other organizations within the Gun Factory, that is those running the officers' exchange and others listed, have the same form of contract with the Board of Governors that you have?

Mr. McKaye: First of all, the Board of Governors' complete name is the Board of Governors of the Naval Gun Factory Cafeterias. That is all they deal with. Of course the Officers' Mess is run by the Board of Officers in the Naval Gun Factory.

Mr. Jaffee: Was the Board of Governors—with the rest of the name you mentioned—appointed by the Superintendent?

Mr. McKaye: That is right, they are supervisory people, appointed by the Superintendent.

88 The Chairman: How many on the Board, if you know?

Mr. McKaye: There are seven, sir.

This form which is being used now for our employees, where they use it to get the badge for admittance, has it been changed in the past two years?

. . .

Mr. Baker: I do not believe it has at any time.

. . .

Mr. Dunau: Will you answer this, Mr. Baker: Does Mrs. Brawner have access to classified information?

Mr. Baker: I hardly think so.

Mr. Dunau: Do you have access to classified information?

Mr. Baker: No, sir.

Mr. Dunau: When you discussed with Mr. Pyles—isn't that his name?

. . .

Mr. Baker: Yes, sir.

Mr. Dunau: And when he told you that he had been instructed to see that the badge of Mrs. Brawner was lifted, instructed by the Security Officer, he also told you, as I understand it, that if a question were asked of you, you could point to the provisions in the concession agreement as authority for such action. Is that correct?

Mr. Baker: I told Mr. Pyles I would have to take it up with Mr. McKaye, who is the President of the Company, and of course my superior. When I pointed that out he said: "You just tell Mr. McKaye I am acting under the security provision of the contract between us."

Mr. Dunau: Did you at that time suggest to Mr. McKaye that you had an obligation under the collective bargaining agreement?

Mr. Baker: We certainly discussed it.

Mr. Dunau: Did you suggest it to Mr. Pyles?

Mr. Baker: That was part of the reason for him coming back to me with such an answer, sir.

Mr. Dunau: You did tell him that notwithstanding the concession agreement, there was another agreement within the picture, that you were required to live up to?

Mr. Baker: He was perfectly aware of it. He knows we have an operating contract with the local union.

Mr. Dunau: Did he suggest any reason why the

concession agreement should be given precedence over the collective bargaining agreement?

Mr. Baker: No, he did not specifically, except to say that he had been directed—and of course the civilians in the Naval Gun Factory take orders from the military, and there is never any question about that.

The Chairman: Some of this we will be discussing as a Board of Arbitration, but, nevertheless, since you are outlining your position, I must tell you something which concerns me is, what opportunity did this woman have to state her case or to obtain any information, or get any clarification of the reason for the picking up of her badge,

which is of course the pivotal or crucial step in this whole proceeding? :

All she was told was "surrender your badge," and despite efforts by the Union, and by the Union counsel, to this day she has not been told what the charge is against her.

Mr. Cullen: And efforts by the employer also, I might add.

The Chairman: Not only was there no hearing or no clarification or no specification, but not even a statement on which the ultimate conclusion was reached. It was just said that she was not satisfactory from a security standpoint, which may mean anything.

102 Mr. Cullen: . . .

103 Our position is heartily in accord with the viewpoint of the Union on this, and we are in entire agreement and we hold no brief for the Security Officer's actions, but can those actions be imputed to the employer?

108 (Whereupon, at 1:50 o'clock p.m., Thursday, May 2, 1957, the hearing in the above entitled matter was closed.)

Exhibit S

AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR

Voluntary Labor Arbitration Tribunal

CAFETERIA AND RESTAURANT WORKERS, LOCAL NO. 473,

and

M & M RESTAURANTS, INC.**AWARD OF ARBITRATORS**

NATHAN CAYTON and JOHN B. CULLEN, constituting a majority of the Board of Arbitrators herein, and having been designated in accordance with the Arbitration Agreement entered into by the above named parties and dated March 15, 1954, and the Impartial Arbitrator, NATHAN CAYTON, having been duly sworn, and the said Board of Arbitrators having duly heard the proofs and allegations of the parties, and having examined the stenographic transcript of the testimony herein and the various Exhibits introduced into evidence by the parties, AWARD, as follows:

1. Rachel Brawner was not discharged without good and sufficient cause, and the relief requested by the Union in the Demand for Arbitration herein, dated February 1, 1957, is hereby denied.

2. The costs of these proceedings, including the fee of the Impartial Arbitrator, and the administrative fees of the American Arbitration Association, and any other expenses of the Arbitration, are to be borne equally by the parties.

One member of the Board of Arbitrators, SAMUEL H. JAFFEE, appointed to the Board by the Union herein, dissents from this Award.

/s/ NATHAN CAYTON

Nathan Cayton, *Impartial Arbitrator*

/s/ JOHN B. CULLEN

John B. Cullen, *Arbitrator*

Appointed by the Company

Dated: July 17, 1957

DISTRICT OF COLUMBIA SS:

On this 5th day of August, 1957, before me personally came and appeared Nathan Cayton and John B. Cullen, to me known and known to me to be the individuals described in and who executed the foregoing instrument and they acknowledged to me that they executed the same.

/s/ ROSE M. DAVIS [sp?]

Notary Public

My Commission expires May 14, 1960

Case No. L-18508; WASH L-1-57

119 AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case No. L-18508; WASH L-1-57

In the Matter of the Arbitration between

CAFETERIA AND RESTAURANT WORKERS, LOCAL 473

and

M & M RESTAURANTS, INC.

OPINION AND AWARD

For more than six years Rachel M. Brawner had worked for M & M Restaurants, Inc. (hereinafter referred to as the Company), as a short-order cook or breakfast cook, in a cafeteria within the grounds of the Naval Gun Factory in the City of Washington.

A Board of Governors, appointed by the Superintendent of the Naval Gun Factory, represents the Superintendent in controlling the operation of this and two other cafeterias maintained by the Company at the Gun Factory. The Concessionaire agreement is between the Company and the Board of Governors.

On November 14, 1956, the Secretary-Treasurer of the Board of Governors notified the Company supervisor by telephone that the Security Officer of the Naval Gun Factory had demanded that Rachel Brawner turn in her identification badge because "there was a question of security clearance". (All persons must have and show such badge in order to be permitted to enter or leave the grounds.)

The next morning the Company supervisor told Mrs. Brawner what had happened. She was "very upset" and "surprised that such a thing would come up", and disavowed any act which might ever have given rise to a question as to her right to security clearance. She handed her badge to the supervisor who in turn surrendered it to the Security Officer. The following day, November 16, 1956, the Board of Governors wrote to the Company that Mrs. Brawner's badge had been turned in and that she "would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer".

At the request of the Union, the Company requested the Board of Governors, in writing, to arrange a meeting "for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner", and also requested that two representatives of the Union be invited to attend the meeting. The Superintendent of the Gun Factory replied that such a meeting "would serve no useful purpose and is therefore unnecessary". No reason has been given then or since, for refusing security clearance to this employee.

Treating the situation as one in which an employer has discharged an employee without cause, the Union, after an exchange of letters with the Company, demanded arbitration on January 11, 1957.

On January 30, 1957, the Union's attorney wrote to the Superintendent of the Naval Gun Factory asking for information as to the authority for the action taken against

Mrs. Brawner. On February 27, 1957, the Superintendent replied that the Concessionaire Agreement specified that the employees of the Company "who work at the Naval Gun Factory cafeterias must meet the basic security requirements as regards entrance into the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked."

On April 17, the Union's attorney wrote to the Superintendent to apprise him of the date of the arbitration hearing and invited the Superintendent "personally or by a representative to attend the hearing to state your position and present evidence" relating to the situation. The invitation was not accepted.

A hearing was had and testimony taken by the Arbitrators on May 2, 1957. Briefs were later submitted by counsel.

POSITION OF THE UNION

The arguments advanced by the Union may be summarized as follows: that Mrs. Brawner was discharged by the Company; that the discharge was "without good and sufficient cause" under the collective bargaining agreement between Company and Union; that the Security Officer of the Gun Factory had no legal authority to take away Mrs. Brawner's badge or bar her from the grounds; that when the Company entered into the Concession Agreement with the Board of Governors and agreed not to engage or keep employees who fail to meet security requirements, it violated the Company-Union contract, because under the National Labor Relations Act, it was the duty of the Company to bargain exclusively with this Union in respect to working conditions, including discharges; that reliance upon the Security Officer's invalid action furnishes
 121 the Company no defense to its discharge of Rachel Brawner; that the arbitrators should issue an award ordering the Company to reinstate this employee with

back pay; and that the Union will then bring action in the United States District Court to enforce the award, and will join as defendants the Secretary of the Navy and his subordinates, "to secure against them an order requiring them to desist from interfering with the Company's compliance with the award". The Union cites an earlier arbitration case in which such a result was accomplished without resort to court action.

POSITION OF THE COMPANY

The Company contends (1) that it has not discharged this employee, and (2) that any interruption of her employment was not ordered or caused by the Company, but was the result of official government action which the Company has no control.

AWARD

The undersigned, being a majority of the arbitrators, decide as follows:

Article 6 of the Contract requires the Union, in a wrongful discharge grievance case, to "prove that an employee was suspended or discharged without good and sufficient cause". The evidence before us does not establish that Rachel Brawner was ever discharged by the Company. There was no evidence from which it can be said that the Company ever indicated any desire or intention to terminate or dispense with her services. On the contrary, the Company has from the time this situation first arose always said that her services were excellent and that they would put her back to work immediately if she could prevail on the government officials to restore her security badge. And it is clear that without such badge she cannot work for the Company because she cannot enter the grounds of the Gun Factory.

We think the good faith of the Company is not open to question in this situation, and that it was not required to

do more than it did in seeking a hearing for the employee. She herself said that when she asked the Company supervisor what she ought to do, he suggested that she write to the Superintendent of the Gun Factory. And the Union must have been aware of the courses which were open to secure an official explanation as to why the employee had been denied security clearance.

122 We think the Union is adopting an unrealistic approach in seeking to obtain an adjudication from this Board that the employee was wrongfully discharged and should be reinstated, and then proposing to use such adjudication as a basis for compelling Governmental action restoring her clearance status. The real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully, she contends) denied her physical access to the place of her employment.

It is our decision and award that Rachel Brawner was not discharged without good and sufficient cause, and that the demand of the Union in her behalf is not justified.

Our dissenting colleague advises us that he will file a dissenting opinion following the date hereof.

/s/ NATHAN CAYTON
Nathan Cayton

/s/ JOHN B. CULLEN
John B. Cullen

Dissenting:

/s/ SAMUEL H. JAFFEE (8/6/57)
Samuel H. Jaffee
(with opinion to be
later filed)

Washington, D. C.
July 17, 1957.

123 AMERICAN ARBITRATION ASSOCIATION, ADMINISTRATOR
VOLUNTARY LABOR ARBITRATION TRIBUNAL

Case No. L-18508; WASH L-1-57

An Arbitration Between

CAFETERIA AND RESTAURANT WORKERS, LOCAL 473

and

M & M RESTAURANTS, INC.

DISSENT BY SAMUEL H. JAFFEE

I dissent. Not only, in my view, has the majority decided wrongly but it has not squarely met the issue at all. The case came to arbitration on the Union's claim that the Company violated Section 6 of the 1954-1956 collective bargaining agreement which provides in part that "The Employer agrees not to suspend or discharge any employee without good and sufficient cause." Because the employer, under another (later) contract to which the Union was not a party, and of which the Union did not have knowledge, in effect contracted to permit a breach of Section 6, the majority absolves the Company from liability here. The majority has decided *not* the issue presented to the Board of Arbitration for determination, but something else. In doing so it has, I respectfully suggest, failed in its obligation to decide the issue properly before it.

Because the majority's outline of the facts is inadequate to enable the reader to know what actually happened, and what the problem before us is, I set them out now.

I

There is not factual dispute of consequence in the evidence. As Mr. Cullen, Company counsel (he was also the Company's designee as arbitrator on the Board), said in oral argument, "There is no question about the facts of the matter" (Transcript 96), and in his brief he said

(page 1) that "There is no dispute as to the facts in the case". My colleagues have agreed with me that the stenographic transcript of the testimony accurately presents those facts brought out at the hearing, and that the transcript may be considered incorporated by reference as part of the majority decision. What, then, happened here?

The Company, a private corporation, operates cafeterias within the grounds of the Naval Gun Factory in Washington, D. C. Since 1942, and ever since, the Union was duly certified by the National Labor Relations Board for the usual collective bargaining purposes (see Labor-Management Relations Act, Section 9(a)). The collective bargaining agreements between the parties have so recognized the Union for these purposes.

The employees are civilian, non-governmental employees. It is conceded that *none has access to "classified information"*. Indeed, Baker, the manager of the cafeterias, has no such access.

The cafeterias are operated pursuant to an agreement between the Company and the "Board of Governors"; a body composed of seven civilian governmental employees appointed by the Superintendent of the Naval Gun Factory. The Union was not only *not* a party to this agreement, but until the arbitration hearing it did not know of its existence or contents. The agreement, herein called the Concession Agreement, was executed October 1, 1955 (the collective bargaining agreement here involved was executed March 3, 1954 and was in existence through December 31, 1956). Section 5(b) of the Concession Agreement provides in part as follows:

* * * In no event shall the Concessionaire [the Company] engage, or continue to engage, for operations under this Agreement, personnel who

(i) fail to pass satisfactory medical examinations where the handling of food is involved;

(ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;

(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity [Naval Gun Factory], as determined by the Security Officer of the Activity.

At all times material herein Mrs. Rachel Brawner worked as a short-order or breakfast cook in one of the cafeterias. She had been there employed for about 6½ years. The Company states that it is "completely satisfied with the employment record of Rachel Brawner and considers her above average in the discharge of her duties".

On November 14, 1956, a member of the Board of Governors telephoned Baker, the cafeteria manager, requesting that the Company have Brawner "turn in her . . . identification badge . . . ;" that there was "a question of security clearance".

On November 15, Brawner was relieved from work. Baker told her he had been instructed to pick up her badge "for security reasons". Brawner said she knew of nothing she had done that involved security. Baker said "That is all I know, to pick up your badge." Brawner handed Baker the badge. Baker told her she might write to the Security Officer or to the Superintendent, or to see Mr. Palmer, her Union business agent.

Baker turned over Brawner's badge to the Security Officer. Neither then nor at any time thereafter was any explanation given for the conclusion that Brawner's security was in question. When she was first employed, Brawner, like all cafeteria employees, had been screened by the Security Officer, and no question of security concerning her had been raised in the ensuing 6½ years.

In a confirmatory memorandum from the Board of Governors to the Company on November 16, it was stated that the Security Officer had notified the Board that Brawner

"would have to surrender her . . . badge and would not be permitted to enter" the Gun Factory premises (the "yard" which included the cafeterias) "until clearance was certified by the Security Officer", and that the badge was accordingly returned on November 15.

Mrs. Brawner was immediately removed by the Company from its payroll, and her pay promptly stopped. The Union promptly asserted that this action violated Section 6 of the collective bargaining agreement, as quoted above.

The Union several times sought from the Company a statement of the reasons underlying the conclusion that Brawner did not meet "security requirements." Each time the Company replied that it did not know and was unable to find out. The Union asked "that some meeting be held" and that a "fair hearing" be accorded Brawner. Accordingly, on December 12, 1956, the Company wrote to the Board of Governors requesting that "a meeting be arranged". On January 10, 1957, the Company wrote to the Union that it had been informed by the Superintendent of the Naval Gun Factory that "such meeting would serve no useful purpose . . ."

On January 30, 1957, the Union's attorney wrote to the Superintendent for information as to the procedure and authority for the action taken. On February 27, 1957, the Superintendent replied that the Concession Agreement specified that the employees of the Company "who work at the Naval Gun Factory must meet the basic security requirements [paragraph 5 (b) iii of the Concession Agreement] as regards entrance into the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked."

¹ This response was based on a memorandum from the Board of Governors to the Company, which in turn enclosed a memorandum from the Superintendent to the Board. The latter memorandum said that Brawner did not meet "the security requirements" set out in paragraph 5 (b) iii of the Concession Agreement.

126 On April 17, the Union's attorney wrote to the Superintendent to apprise him of the arbitration hearing to be held May 2, and inviting the Superintendent "personally or by a representative to attend the hearing to state your position and present evidence" relating to the situation. The invitation was ignored.

The only evidence at the arbitration hearing as to whether Mrs. Brawner was a security risk was to the effect that she was not.

II

The question to be decided is simply whether there was "good and sufficient cause" for the removal by the Company of Rachel Brawner from its payroll—not just any cause, but "good and sufficient" cause. What the parties have entrusted to the Arbitration Board arises from an agreement which they have made *with each other*, an agreement of a kind which is encouraged by a public policy written by the Congress into Section 1 of the National Labor Relations Act. It is the joint agreement of these parties which recognizes or creates the rights, the duties, the obligations here involved—to *each other*. That agreement, with the rights and duties created thereunder, is at once the source and the limits of the power of this Board. The collective agreement is the *charter*, not only for the parties who are here, but for the Arbitration Board which the parties have brought into being. And since that charter is at once the source and the limits of the power of the Board, the Board has no roving commission to inflict on the parties its own private notions of what it may think ought to be done. But it has, I am afraid, done precisely that here.

Brawner was and is concededly a better than average worker. What then warranted her removal from the payroll? The Company replies that the Security Officer asked for her badge "for security reasons" under a concession

agreement never made known to the Union, purporting to give him unlimited discretion so to act on his own say-so; that the Company thus had to sever Brawner from its payroll; and that the Company had no choice because it was, so to speak, "in the middle."

127. So then the Company's justification comes to this. It says in effect to us:

We got rid of Brawner because the Security Officer asked us to,² as he had a right to do under the Concession Agreement we made, even though that was never made known to the Union, and even though (as shown below) the very making of it, as to the terms here relevant, was adversely to affect the employment relationship, and was, moreover, in flat violation of the law of the land and of the collective agreement itself.

Let us assume that it was a private landlord with whom this Company made the Concession Agreement, giving to that landlord the same unlimited discretion as was given to the Security Officer here, and the landlord then ordered that Brawner be kept out of the premises, as she then was. Should not the Arbitration Board, in that circumstance, properly find that the discharge was without good and sufficient cause? For why should the *collective* agreement, which requires such cause, be held nugatory simply because this employer chose to make an agreement with someone else which would bring about that result? That would make the employer its own judge, jury, and executioner. And it would then, obviously, be an idle gesture to set up an Arbitration Board in a case of this kind. (The present

² The attempt to draw a line between a picking up the badge and the severance from the payroll is patently in aid, for the Company treated one as inevitably requiring the other. And it was a discharge, the majority to the contrary. Brawner is concededly off the payroll. But even if the severance be treated as a suspension rather than a discharge, it makes no difference here, for the collective agreement (Section 6) requires *either* to be for good and sufficient cause. Moreover, Section 5(b) of the Concession Agreement requires that the employer not "engage, or continue to engage" employees who do not meet the requirements therein set out, which of course means that the employer will not hire or keep such employees.

Board was set up pursuant to a provision in the collective bargaining agreement providing for arbitration.)

What is the difference here? The essential factual difference lies only in the fact that the Concession Agreement was made with a "Board of Governors" appointed by the Superintendent of the Naval Gun Factory. Does that fact require a different result? I am firmly convinced that the answer is and must be in the negative.

It was overwhelmingly shown that, Section 5(b) of the Concession Agreement aside for the moment, that when the Security Officer asked for the return of the badge "on security grounds" he acted without any legal basis whatever.³ It is important to note that he (and the Superintendent) relied for the validity of that action solely on Section 5(b) of the Concession Agreement. The Company entered into that agreement with 5(b) in it, unknown to the Union, whereby the Company, for all practical purposes, purported to abdicate its right initially to determine whether an employee warranted discharge or suspension and, instead, turned that question over to the Security Officer, a stranger to the collective agreement, who could, under the Concession Agreement, act within his uncontrolled discretion.

Of course, the Union could have no valid objection to a concession agreement, as such. What it does object to, and validly so, and what the law itself objects to, is this

³ The security program applicable to private employers and employees is confined to those who have access to classified information. That is provided by the "Industrial Personnel Security Review Regulation". Section I (1) of this Regulation states: "This regulation prescribes the uniform standard, and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals as set forth herein, who have access to classified defense information" (emphasis added). See also: Secs. I(2) (e), I(6) (a) (1-3). The record shows, and common sense confirms, that Rachel Brawner has no access to classified information; indeed, the Company's manager of all its cafeterias at the Naval Gun Factory has none. Further corroboration is found in the Department of Defense regulation reported in 21 Fed. Reg. 5352, 5355, s. 7.104-12 (July 18, 1956). Finally, despite inquiry as to this very matter, the Superintendent of the Naval Gun Factory has not relied for his authority to act, or that of his Security Officer, upon any statute, executive order, or departmental regulation.

particular Concession Agreement because of 5(b) in it, for that section, as far as this Company is concerned, is in violation of both the law of the land and of the collective agreement itself.

Section 9(a) of the National Labor Relations Act provides that a majority union "shall be the exclusive representative of all the employees" in the bargaining unit "for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ." As the Supreme Court said in *NLRB v. Jones & Laughlin*, 301 US 1, 44 (the landmark case), the obligation being exclusive "*it exacts the negative duty to treat with no other*" (emphasis added). And "collective bargaining extends to matters involving discharge actions . . ."; *Inland Steel v. NLRB*, 170 F.2d 247, 252 (CA-7), cert. den. 336 US 960.

It is obvious, therefore, that by contracting with another to permit the Security Officer to get an employee off the payroll, who allegedly fails to meet the standards of 5(b) of the Concession Agreement, the Company violated its statutory duty "to treat with no other" on matters as to which the Union is the exclusive bargaining representative. A contract which is the product of an employer's violation of his statutory duty, cannot "limit or condition the terms of a collective agreement." So held the Supreme Court in *J. I. Case Co. v. NLRB*, 321 U.S. 332, 337. Accordingly, the Concession Agreement, as here applicable, falls because of its incompatibility with the National Labor Relations Act. There is simply no other conclusion that is possible.⁴

And who was it that violated the law and the collective agreement? The answer is M & M Restaurants, Inc. So, then, the case comes to this: The Company breaks the law

⁴ It is idle to speculate what the situation would be had there been no Section 5(b) in the Concession Agreement. For the fact is that provision is in it and both the Company and the Superintendent of the Naval Gun Factory rely solely upon that section as justification for what happened.

and the management-union agreement and now tells us as follows:

Even though we broke the law and the collective agreement, resulting in the severance of Brawner without good and sufficient cause, you cannot successfully arbitrate the severance. Even though we broke the law and the collective agreement you, the employee, and you, the Union, cannot proceed against us for the violation.

To which the majority adds: "And the Union must have been aware of the courses which were open to secure an official explanation as to why the employee had been denied security clearance." This, I must confess, I cannot understand at all. What "courses . . . were open" to secure that "explanation"? Did not the Union ask for an "explanation" both from the Company and the Superintendent of the Naval Gun Factory? Was not any explanation denied? And was not the request for a meeting met with the response that it would "serve no useful purpose"?

When the majority speaks of "courses" that are "open", does it mean that the Union should have sued the Government officials involved? But if that be so, why should it be the *Union* which should have to go to court? Among other things, this would mean that for some strange reason Section 5(b) of the Concession Agreement, which has no warrant in law at all, is to override a collective agreement in the face of the Labor Act policy which encourages the making of such agreements.

It is elementary to anyone with substantial familiarity with labor relations that there is no greater threat to such relations, indeed no greater threat to the very existence of a labor organization, than to permit an employer the unilateral action it has indulged here. If an employer, directly or indirectly, can on his own, get the membership fired without the redress and the procedure prescribed in the collective agreement itself (via the arbitration provi-

sion), where the discharge is without good and sufficient cause, then the union's very life is in serious jeopardy, for its bargaining strength is gone.

130 But the Company takes the position that it has been caught in a squeeze. First of all, it is sufficient to reply that assumed business exigency is neither a defense to a violation of law nor to a breach of contract.⁵ Second, the "squeeze", such as it is, is of the Company's own making. Having participated in its own violation of both the law and the collective agreement, it hardly lies in the mouth of the employer to use its own illegality, and its own breach, as the very means of absolving itself from its own wrong. In the circumstances shown here, the law simply leaves the Company where it has chosen to place itself, and it is for it to extricate itself from the dilemma of its own fashioning, instead of attempting to pass the squeeze on to the employee who is, concededly, completely innocent in every way.

Moreover, the squeeze is more apparent than real, or is at best but temporary. There was no practical problem in a similar situation at the Pentagon, as shown in the decision of the arbitration board in the case of *National Food Corporation*, 24 Labor Arbitration Reports 567. If, however, following an award in favor of the Union, the Superintendent of the Naval Gun Factory should remain adamant, the Union could take the case to the District Court and join the appropriate government officials as parties. If the Union should lose in court, then, from that point on, the Company would be in the clear. For then,

⁵ The following is from *NLRB v. Hudson Motor Car Co.*, 128 F. 2d 528 (CCA-6), at 532-33: "Respondent's contention boils down to the proposition that it was forced [to do what it did] and that under the circumstances here present, it was not a free agent . . . and therefore should not be charged with a violation of the Act because it had no intent to violate any of its terms . . . We think it right and just to say that so far as the record shows, respondent has not wilfully violated the provisions of the Act, but the intent of the employer is not within the ambit of our power of review. When it is once made to appear from the primary facts that the employer has violated the express provisions of the Act, we may not inquire into his motives."

on the basis of *valid authority*—the Court order—the Company could, for the first time, claim impossibility of performance, a traditional defense in the law of contracts. But that is not, or at least is not yet, the situation here. For there is yet no “impossibility of performance” in the legal sense.⁶

There is an old legal principle to the effect that where one of two innocent persons must suffer, the one who must bear the loss is the one who has created the situation which has resulted in the wrong. We all agree that Brawner must, on this record, be found to be an innocent person. I do not believe that the Company is entitled to that appellation, for it broke the law of the land and the
 131 collective agreement, and in doing so it created the very situation which brought about Brawner's severance from the M & M payroll. But even assuming the Company were innocent, is this not a perfect case for the application of the legal principle referred to? Why then should *Brawner* be the one to suffer? Why should it not be up to M & M Restaurants, Inc. to extricate itself from its own wrong?⁷

I have said that the Security Officer acted as he did without any legal authority. If it be suggested that any want of authority is overcome by the Security Officer's control of access to government property, it is, in my view, sufficient to answer that control of access does not empower a federal officer to act in excess of his authority or under authority not validly conferred. For otherwise no government employee could ever have successfully challenged his

⁶ See Restatement, Contracts, s. 454 ff, and Corbin, Contracts, s. 1320 ff.

⁷ That the principle above referred to exists in labor law, is shown by the following from *NLRB v. Industrial Cotton Mills*, 208 F. 2d 87 (CA-4) at page 91: “It is true that where denial of reinstatement results from the employer's reasonable and sincere mistake, there is no evil intention behind the harm suffered by the employee. While the employer's attitude may not be censurable, the employee too is free of blame. As between the victim of the mistake and the person who made the mistake, it seems just that the perpetrator bear the onus of his own error rather than that the burden of this error should be shifted to the employee who cannot guard against it.”

ouster from public employment on security grounds: the government could simply answer his protest by saying that the government cannot be required to permit him to work in a building it owns and from which his entry could be barred. Yet the number of cases is substantial where the courts have overturned such ousters and have thus, perforce, reinstated the right of access.

And a non-government employee stands in no worse position. For whatever the rights of the Security Officer may be in the abstract, where, as here, he and the Superintendent of the Naval Gun Factory have relied for their right of ouster solely on Section 5(b) of the Concession Agreement, and it has been abundantly shown that that "right" cannot override the collective bargaining agreement and the law of the land, it is invalid to argue that the Union's case must fail on any theory of the right to bar access. Within our scheme of limited powers, federal officers are not lords of the manor empowered to act without authority or under invalid authority.

A final point: It may be asked how else the Company could have protected itself in cases of this kind. One way it could have done so was to seek the inclusion into the collective agreement of a clause like one between the present Union and Government Services, Inc., a private
132 company which provides cafeteria service in several government buildings in the Washington area. That clause provides in part that grievances concerning suspensions or discharges shall not be subject to arbitration where the "Suspension or discharge [is] made at the request of the Head of a Federal Agency". But there is no such clause in the agreement here.⁸ And in any event,

⁸My colleague, Mr. Cullen, who also acted as Company counsel in this case, informed the other members of the Board, as I originally understood him, that during the negotiations which led to the making of the collective agreement here in issue, the Company sought the inclusion into the agreement of a clause like the one between this Union and Government Services, Inc. as quoted above, but that no such clause became part of the collective agreement in the present case. Because it was understood that this fact would be in-

as has been seen, the Company may not validly use its own illegality, and its own violation of the collective agreement, as the very means of its own absolution. My colleagues have, unfortunately, accepted such bootstrap reasoning, and have simultaneously penalized the innocent party while rewarding the wrongdoer.

SAMUEL H. JAFFEE
Arbitrator

Washington, D. C.
August 6, 1957

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(Filed Oct. 7, 1957)

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

Civil Action File No. 2246-57

CAFETERIA AND RESTAURANT WORKERS UNION, Local 473,
AFL-CIO, RACHEL M. BRAWNER, *Plaintiffs*

v.

M & M RESTAURANTS, INC., ET AL., Naval Gun Factory,
Washington, D. C., *Defendants*

Answer to Complaint for Declaratory Judgment, for Injunctive Relief, to Vacate an Arbitration Award, and to Recover Damages

Defendant M & M Restaurants, Inc. answers the complaint in the above entitled cause as follows:

cluded in the majority decision, Union counsel did not move to reopen the record so that such fact could be included therein. Mr. Cullen later informed me that he was misunderstood, that in fact it was in connection with the collective agreement between the present parties which was to take effect following the expiration of the current agreement (the expiration date being December 31, 1956) that the parties discussed the insertion of such a clause, but did not insert it. I accept Mr. Cullen's version on this point. But in either event, the fact serves to emphasize what is stated in the text above.

FIRST DEFENSE

The complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

1. Defendant admits allegations in paragraph 1 of the complaint.

2. Defendant is without knowledge as to the allegations in paragraph 2 of the complaint and therefore neither admits nor denies them but demands strict proof of the same.

3. Defendant admits the allegations contained in paragraph 3, 4, 5, 6, 7 and 8 of the complaint.

4. Defendant admits the allegations contained in paragraph 9 of the complaint but avers that the agreement between the defendant and the Board of Governors of the Naval Gun Factory Cafeterias entered into on October 1, 1955 is a successor agreement to one entered into originally in 1946.

5. Defendant admits the allegations in paragraph 10 of the complaint except with allegation that the plaintiff, Rachel M. Brawner was discharged which it denies.

6. Defendant admits the allegations contained in paragraphs 11 and 12 of the complaint.

134 7. Defendant admits the allegations in paragraph 13 of the complaint that the plaintiff Brawner has not worked for the company since November 15, 1956 and has received no wages or other benefits from the company since that time. It denies that it discharged the plaintiff Brawner and that her employment with the company was permanently severed.

8. Defendant admits the allegations contained in paragraph 14 of the complaint.

9. Defendant is without knowledge as to the allegations contained in paragraphs 15 and 16 of the complaint and neither admits nor denies same but demands strict proof thereof.

10. Defendant admits the allegations contained in paragraph 17 of the complaint.

11. Defendant admits the allegations contained in paragraph 18 of the complaint except it denies that the plaintiff Brawner was discharged.

12. Defendant admits the allegations contained in paragraph 19, 20, 21 and 22 of the complaint.

13. Defendant admits the allegations contained in paragraph 23 of the complaint but avers that the reference to exhibit 15 of the plaintiff is argumentative and has no place in the complaint.

14. Defendant is without knowledge of the allegations contained in paragraph 24 of the complaint and neither admits nor denies the same, but demands strict proof thereof.

15. Defendant admits the allegations contained in paragraph 25 of the complaint that the award of a majority of the Board of Arbitrations and the majority and dissenting opinions were sent to the representatives of the Company and the Union. It also admits as to the holding of the majority of the Board of Arbitrations but denies that the majority based this conclusion on the views as alleged in paragraph 25 of the complaint. The award, plaintiff's Exhibit S speaks for itself and the defendant denies that the majority of the Board expressed its reasons for the conclusion contained therein.

135 16. Defendant is without knowledge as to the allegations contained in paragraph 26 of the complaint and neither admits nor denies the same but demands strict proof thereof.

17. Defendant denies the allegations contained in paragraph 27 of the complaint.

18. Defendant denies the allegations that the majority of the Board of Arbitration exceeded its powers as alleged in paragraph 28 of the complaint and is without knowledge as to the other allegations contained therein and neither admits nor denies the same, but demands strict proof thereof.

WHEREFORE, defendant M. & M Restaurants, Inc., prays that the complaint herein be dismissed with the costs to the plaintiff.

JOHN B. CULLEN

John B. Cullen

Investment Building

Washington 5, D. C.

Attorney for Defendant

M & M Restaurants, Inc.

136

(Filed November 4, 1957)

Answer

Now come the defendants Neil H. McElroy, Thomas S. Gates, D. M. Tyree and H. W. Williams, and in answer to the Complaint filed herein, say:

FIRST DEFENSE

The Complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

The Court lacks jurisdiction over the subject matter of the Complaint.

THIRD DEFENSE

Answering specifically the allegations contained in the numbered paragraphs of the Complaint, the defendants McElroy, Gates, Tyree, and Williams aver:

1. Defendants assert that inasmuch as the allegations contained in paragraph 1 of the Complaint state conclusions of law, they are not required to plead responsively thereto; but were they required to reply, they would deny the conclusions of law alleged therein.

137 2-3. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 2 and 3 of the Complaint.

4. The Defendants admit the allegations contained in paragraph 4 of the Complaint.

5. Answering paragraph 5 of the Complaint, the defendants admit that M. & M. Restaurants, herein called the Company, transacts business within the District of Columbia, and has an office at the United States Naval Gun Factory. The defendants also admit that the Company operates five cafeterias on the premises of the Naval Gun Factory. The defendants are without knowledge or information sufficient to form a belief as to the truth of the other allegations contained therein.

6. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 6 of the Complaint.

7. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7 of the Complaint except that defendants admit that up to September 1946, the cafeterias at the United States Naval Gun Factory were operated by a Miss H. K. Dickson, and that in September 1946, the Company took over operation of the cafeterias from Miss Dickson.

8. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 of the Complaint.

9. Answering paragraph 9 of the Complaint, the defendants admit that there are five cafeterias operated by the Company on the premises of the Naval Gun Factory, and that the Company's employees are civilian nongovernmental personnel. The defendants admit the other allegations contained therein.

10. The defendants are without knowledge or information sufficient to form a belief as to the truth of the 138 allegations contained in paragraph 10 of the Complaint except that the defendants admit that one of the cafeterias operated by the Company on the premises of the United States Naval Gun Factory is known as the Bellevue Annex Cafeteria and is located at Overlook Drive and Chesapeake Street, S. W., Washington, D. C.

11. The defendants deny the allegations contained in paragraph 11 of the Complaint except that the defendants admit that on November 14, 1956, H. R. Pyles, Secretary-Treasurer of the Board of Governors, telephoned H. R. Baker, and requested that Baker return Plaintiff Brawner's identification badge to Defendant Williams. The defendants further admit that an identification badge is required to secure entrance to and exit from the Naval Gun Factory.

12-13. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 12 and 13 of the Complaint.

14. The defendants admit the allegations contained in paragraph 14 of the Complaint.

15. Answering paragraph 15 of the Complaint, the defendants admit that Rachel M. Brawner, and Harold R. Baker have no authorized access to classified information.

16. The defendants deny the allegations contained in paragraph 16 of the Complaint.

17. The defendants admit the allegations contained in paragraph 17 of the Complaint.

18. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 18 of the Complaint.

19. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 19 except that defendants admit that the Board of Governors received a letter from the Company dated December 12, 1956, a true and correct copy of which is annexed to the Complaint as Exhibit G-1, which letter speaks for itself.

20. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 20 of the Complaint.

21. The defendants admit the allegations contained in paragraph 21 of the Complaint.

22. The defendants admit the allegations contained in paragraph 22 of the Complaint.

23-25. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 23 to 25 inclusive, of the Complaint.

26. The defendants deny the allegations contained in paragraph 26 of the Complaint.

27-28. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 27 and 28 of the Complaint.

WHEREFORE, the defendants pray that the Complaint be dismissed with costs to the defendants.

JAMES T. DEVINE
Attorney,
Department of Justice
 Washington, D. C.

DONALD S. SMITH
Attorney,
Department of Justice
 Washington, D. C.
Attorneys for Defendants

141

Filed November 13, 1957

Interrogatories

To: Neil H. McElroy, Thomas S. Gates,
 D. M. Tyree, and H. C. Williams, Defendants
 c/o James T. Devine, Esq. and
 Donald S. Smith, Esq.
 Internal Security Division
 Department of Justice
 Washington 25, D. C.

The following interrogatories are addressed to you pursuant to Rule 33 of the Federal Rules of Civil Procedure. You are required to answer these Interrogatories separately and fully, in writing, under oath, and to serve a copy of your answer Bernard Dunau, 912 Dupont Circle Building, N. W., Washington 6, D. C., attorney for plaintiffs, within 15 days after mailing of these Interrogatories as indicated below:

1. Referring to your partial denial of the allegations of paragraph 11 of the complaint, state in detail the contents of the conversation or conversations had on November 14, 1956, and/or on any other day, between H. R. Pyles, Secretary-Treasurer of the Board of Governors, and Harold R. Baker, supervisor of the Company's cafeterias at the Naval Gun Factory, pertaining to plaintiff Rachel M. Brawner.

2. Referring to your answer to the allegations of paragraph 15 of the complaint, (a) state whether Rachel M. Brawner has *any* access to classified information, (b) if she has *any* access, state in detail what that access is, (c) state whether Harold R. Baker has *any* access to classified information, and (d) if he has *any* access, state in detail that that access is.

142 3. Referring to your denial of the allegations of paragraph 16 of the complaint:

(a) Prior to the initial employment of a civilian non-governmental employee to work within the premises of the Naval Gun Factory, is a procedure followed by the officials of the Naval Gun Factory to determine whether such an employee should be given an identification badge?

(b) If the answer to (a) is yes, state in detail what that procedure is?

(c) If the answer to (a) is yes, state (i) whether that procedure was in effect at the time of Rachel M. Brawner's initial employment by the Company to work within a cafeteria at the Naval Gun Factory, and (ii) if it was not in effect, state in detail what, if any, procedure was then in effect.

(d) If a procedure was in effect at the time of her initial employment, state whether it was applied to Rachel M. Brawner.

(e) Was any question of security pertaining to Rachel M. Brawner communicated to her or to officials of the

Company before November 14, 1956, by any official of the Naval Gun Factory?

(f) If the answer to (e) is yes, state in detail when this was and what happened.

4. Are the memoranda reproduced at pages 37-38 of Exhibit P of the complaint, identified therein as Company's exhibits 2 and 2-A, true copies of genuine documents?

5. Referring to the denial of the allegations of paragraph 26 of the complaint, state in detail the authority by which you support the action taken by you.

Submitted by:

BERNARD DUNAU

Bernard Dunau

912 Dupont Circle Bldg., N. W.
Washington 6, D. C.

Attorney for Plaintiffs.

145

Filed Dec. 23, 1957

Answers to Interrogatories

Answer of defendants D. M. Tyree and H. W. Williams to Interrogatories served on them by plaintiffs on November 12, 1957.

Interrogatory No. 1. On November 14, 1956, H. R. Pyles contacted Harold R. Baker, by telephone, and informed him that it would be necessary to have Rachel Brawner surrender her identification badge to Lieutenant Commander Williams. Mr. Baker inquired as to the reason and was informed that it was for security reasons and that the badge was to be returned as soon as possible. Baker advised that Brawner left the premises at 3:00 P.M. and

would not be available until the following morning but that he would return the badge to Lieutenant Commander Williams the next morning. Mr. Pyles then informed Mr. Baker that this would be confirmed in writing. On November 15, 1956, Mr. Baker came to Mr. Pyles' office and stated that he had returned Brawner's badge to the Security Officer and that she had requested specific reasons for this action. Baker further advised that he had informed her that the only information he had was for security reasons and that she could see Lieutenant Commander Williams and request further information if she desired. Baker stated that Brawner said she would not do this but would see Mr. Palmer of the Cafeteria and Restaurant Workers Union. Baker also stated that he would apprise Mr. McKaye of the situation.

Interrogatory No. 2. Neither Brawner nor Baker have authorize access to classified information, however, the defendants are unable to state whether or not Brawner or Baker have had access to any of the restricted areas on the premises of the Naval Gun Factory or whether Brawner or Baker have access to any classified information.

146. *Interrogatory No. 3.* (a) Yes.

(b) Each applicant for an identification badge is required to complete an application form, a true and correct copy of which is annexed hereto. In addition, each applicant is finger-printed.

(c) None of the defendants held their present positions at the time of Brawner's initial employment and are unable to state what procedure was in effect at that time, however they have reason to believe that the same procedure presently in use was in effect then.

(d) As stated above, none of the defendants held their present positions at the time of Brawner's initial employment and are unable to state whether or not the proceed-

ure was applied to Brawner, however they have reason to believe that it was applied to Brawner.

(e) No.

Interrogatory No. 4. The memoranda reproduced at pages 37-38 of Exhibit P of the complaint, identified therein as Company's exhibits 2 and 2-A are true and correct copies of genuine documents.

Interrogatory No. 5. This interrogatory calls for a conclusion of law which defendants are not required to answer, however, the defendants refer the plaintiffs to the following.

The United States Constitution.

The United States Code and United States Statutes at large.

United States Navy Regulations, 1948, as amended.

United States Navy Security Manual For Classified Matter.

/s/ D. M. TYREE
D. M. Tyree

/s/ HAROLD W. WILLIAMS
Harold W. Williams

Subscribed and sworn to before me this 20th day of December, 1957.

/s/ PORFIRIO F. EUGENIO
Notary Public D. C.

My Commission expires 3/14/58.

148 APPLICATION TO SECURITY OFFICER FOR PASS

NAME

ADDRESS

EMPLOYED BY

DATE OF EMPLOYMENT

PLACE OF BIRTH

DATE OF BIRTH

WIFE'S MAIDEN NAME

PARENT'S BIRTH PLACE

FORMER EMPLOYERS AND APPROXIMATE DATES,

REASON FOR CHANGING:

.....

.....

.....

NAMES AND ADDRESSES OF PARENTS,

BROTHERS AND SISTERS

.....

.....

.....

HAVE YOU ANY RELATIVES LIVING IN FOREIGN COUNTRIES

MILITARY OR NAVAL SERVICE

RACE (White or Colored)

WHERE WERE YOU AND WHAT DOING BETWEEN THE
PERIOD 1914 TO 1918

WHAT IS YOUR SOCIAL SECURITY NUMBER?

149 HAVE YOU EVER BEEN FINED OR IMPRISONED?
SPECIFY

REFERENCE (personal)

I agree to obey all Naval Gun Factory Regulations,
proceed by route designated going and returning, and that
my person or vehicle is subject to search by military police
or yard police. I further agree to safeguard badges issued
to the best of my ability, and will return same promptly
upon expiration, and report loss or mutilation immediately.
I, SOLEMNLY SWEAR (or affirm) that

the statements contained are true to the best of my ability or knowledge.

Signature of applicant

Date

150

Filed Feb. 8, 1958

Plaintiffs' Motion for Summary Judgment

Plaintiffs move for summary judgment against all defendants upon the ground that no genuine issue of material fact exists and plaintiffs are entitled to judgment as a matter of law, as more particularly appears in the points and authorities in support of the motion attached hereto.

/s/ BERNARD DUNAU
 Bernard Dunau
 JAFFEE & DUNAU
 912 Dupont Circle Building
 Washington 6, D. C.
Attorney for Plaintiffs.

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Filed Feb. 27, 1958

Motion to Dismiss Complaint or Cross-Motion for Summary Judgment

Now come the defendants McElroy, Gates, Tyree and Williams and move the court under Rule 12(b) (1) and (6), Rules of Civil Procedure, to dismiss the action because the court does not have jurisdiction over the subject matter and because the complaint fails to state a claim against defendants upon which relief can be granted, or in the alternative to grant summary judgment for defendants

under Rule 56, Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law.

JAMES T. DEVINE
James T. Devine
Attorney,
Department of Justice
Washington, D. C.

DONALD S. SMITH
Donald S. Smith
Attorney,
Department of Justice
Washington, D. C.
Attorneys for Defendants

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Filed Mar. 11, 1958

**Motion Supplementing Defendants' Motion to Dismiss or
Cross-Motion for Summary Judgment**

Now come the defendants McElroy, Gates, Tyree and Williams and move the Court to dismiss the action or in the alternative to grant summary judgment and as further grounds, supplementing the grounds already set forth in defendants motion to dismiss or cross-motion for summary judgment which said motion is incorporated herein and made a part hereof; defendants state that so much of the plaintiffs' suit pertaining to the restoration of plaintiff Brawner to her former position with the defendant Restaurant on the premises of the U. S. Naval Gun Factory, the furnishing of an identification badge to Brawner au-

thorizing her to enter the premises of the Naval Gun Factory and payment of money damages for loss of pay subsequent to January 31, 1958, are moot for the reason that the defendant Restaurant has not operated any coeession enterprise on the premises of the Naval Gun Factory since January 31, 1958, as appears more particularly in the attached affidavit of Charles E. Briner, Superintendent of the United States Naval Gun Factory.

Attached hereto and made a part hereof by reference as Defendants' Exhibits A, B, C, D, E, F, and G, are:

A. Affidavit of Charles E. Briner, Superintendent of the U. S. Naval Gun Factory.

B. Certified copy of a deed of conveyance from James C. and Mary A Dulin, dated October 27, 1873, to the United States of America.

C. Certified copy of General Order No. 227, relating to the Reorganization of the U. S. Navy Yard, Washington, D. C.

D. Certified copy of pages 81, 82, 84, 87, and 209 of United States Navy Regulations, issued August 9, 1948, the text of said pages being in full force and effect throughout November 1956.

E. Certified copy of pages 87 and 209 of United States Navy Regulations, 1948, as changed by Change No. 7, promulgated June 4, 1957, by the Secretary of the Navy and in effect at all times since June 4, 1957.

F. Certified copy of pages 14-1 through 14-4 of the United States Navy Security Manual for Classified Matter, which was promulgated on October 2, 1954, which pages have been in full force and effect at all times since.

G. Certified copy of Department of Defense Directive
5200.8 dated August 20, 1954.

JAMES T. DEVINE
James T. Devine
Attorney,
Department of Justice
Washington, D. C.

/s/ DONALD S. SMITH
Donald S. Smith
Special Assistant to the
United States Attorney
Washington, D. C.

Attorneys for the Defendants

(EXHIBIT A)

157

Affidavit of Charles E. Briner

CITY OF WASHINGTON }
 DISTRICT OF COLUMBIA } SS

I, Charles E. Briner, having first been duly sworn, on oath depose and say as follows:

1. I am a Captain in the United States Navy. I am the Superintendent of the United States Naval Gun Factory. As Superintendent I am the commanding officer of the United States Naval Gun Factory, charged with overall responsibility for said United States Naval Gun Factory.

2. On January 31, 1958, the concession contract between the Board of Governors, Naval Gun Factory Cafeterias, and M & M Restaurants, Inc., pursuant to which M & M Restaurants, Inc., operated cafeterias on the premises of the Naval Gun Factory, expired. Said contract was not renewed. On January 31, 1958, M & M Restaurants, Inc., ceased to operate the cafeterias on the premises of the Naval Gun Factory; and at no time since January 31, 1958, has M & M Restaurants, Inc., operated any cafeterias, or any other concession enterprise, on the premises of the Naval Gun Factory.

3. At all times since February 1, 1958, the Naval Gun Factory cafeterias have been operated by Implant Foods, Inc., a corporation organized and existing under the laws of the District of Columbia.

Further deponent sayeth not.

CHARLES E. BRINER

Charles E. Briner

Captain, United States Navy
 Superintendent, United States
 Naval Gun Factory
 Washington 25, D. C.

Affiant

On this 27th day of February, 1958, before me personally appeared Charles E. Briner, to me known to be the person described in, and the person who executed the foregoing affidavit, and acknowledged it to be his free and voluntary act.

PORFIRIO F. EUGENIO

Notary Public: Wash. D. C.

My Commission expires 3/14/58.

165

(EXHIBIT C)

General Order No. 227

Navy Department,
Washington, D. C.,
28 November 1945.

**REORGANIZATION OF THE U. S. NAVY YARD, WASHINGTON,
D. C., AND THE ESTABLISHMENT OF THE U. S. NAVAL
GUN FACTORY, WASHINGTON, D. C.**

1. The U. S. Navy Yard, Washington, D. C., is, in accordance with the provisions of this order, hereby abolished.

2. The activities present by comprising the Navy Yard, Washington, D. C., shall be regrouped or redistributed as follows:

(a) All departments, divisions, and activities which contribute directly or indirectly to the work of the Naval Gun Factory (including the Design, Planning, Production, Inspection, Gage, and Personnel Relations Divisions; the Supply, Accounting, Disbursing, Medical and Public Works Departments; the activities of the Captain of the Yard; and the Naval Magazine at Bellevue) shall be integrated into one overall organization to be known as the "U. S. Naval Gun Factory, Washington, D. C.," and shall be under the immediate command of an officer designated

"Superintendent, U. S. Naval Gun Factory". This organization shall form one component activity of the Potomac River Naval Command (hereinafter referred to as PRNC).

(b) Each of the remaining activities which do not form a part of the U. S. Naval Gun Factory as defined above (including the Receiving Station, the Marine Barracks, the Naval Ordnance Laboratory, and the Photographic Intelligence Center shall be under the immediate direction of a commanding officer or officer-in-charge, as appropriate, and each such organization shall form a separate component activity of the PRNC.

3. Each of the above component activities, the Ordnance Stock Office, and the activities specified in General Order 192, shall be under the *military command and coordination control* of the Commandant of the PRNC, who will, in turn, be directly responsible to the Chief of Naval Operations. The specific duties and authority of the Commandant, PRNC, in relation to all component activities shall be as follows:

(a) We shall exercise *military command* of these activities, which authority is defined as the authoritative direction exercised over component activities in military matters (defense, security, intelligence, communications, fire protection, military discipline, etc.) together with the power to exercise authoritative direction in all matters when circumstances require.

(b) We shall exercise *coordination control* of these activities which authority is defined as that direction of component activities necessary to assure well integrated relationships among component organizations, together with the authority to make such inspections as are necessary to insure coordination.

166 (c) He shall coordinate the provision of services to the Operating Forces by component activities.

In this connection, he shall be in command of all vessels at, but not assigned to, component activities of the PRNC, but shall limit the exercise of this command:

(1) To coordinating the relationships between the commanding officers of such vessels and the commanding officers of component activities; and

(2) To the enforcement of regulations pertaining to the military administration of the PRNC as provided in paragraph 3(a) above. Upon arrival and before departure of any vessel, the commanding officer shall report to the Commandant, PRNC.

4. Each of the component activities of the PRNC, including the U. S. Naval Gun Factory, shall be under a commanding officer or officer-in-charge as appropriate. Each such commanding officer or officer-in-charge shall be under the military command and coordination control of the Commandant of the PRNC. For all matters of management and technical control, each such commanding officer or officer-in-charge shall be under the direct supervision of the cognizant agencies of the Navy Department designated by the Secretary of the Navy.

5. The officer ordered to command of the U. S. Naval Gun Factory shall be designated Superintendent, U. S. Naval Gun Factory, shall be technically trained in the manufacture of ordnance equipment, and shall have had substantial previous experience in the technical and management phases of such work, both in naval ordnance activities and in the Navy Department. The Superintendent shall be assisted by an "Assistant Superintendent" who shall possess the same general qualifications as those prescribed for the Superintendent.

6. It is the duty of the superintendent, U. S. Naval Gun Factory, to supervise and direct all of the work of the Gun Factory; to assume full responsibility for the quality and quantity of work produced; and to assure the

efficient and economical performance of all of the work of the Gun Factory. The Superintendent, U. S. Naval Gun Factory, shall report to the Chief of the Bureau of Ordnance for management control.

7. All commissioned naval vessels at the U.S. Naval Gun Factory or other component activities of the PRNC shall be subject to the orders of the commanding officer of the component activity for (1) matters pertaining to the specific services rendered to such vessels by the component activity, including ship movements; and (2) the enforcement of the component activity regulations relating to police, fire, security, safety, communications, sanitation, and other matters of plant maintenance and protection. The commanding officers of ships are, however, fully responsible for the internal administration and handling of their vessels while at the component activity except as otherwise provided for in Navy Regulations. The commanding officer's responsibilities regarding the inspection of
167 work done on their vessels are as defined in the Navy

Regulations. In the event of any unsatisfactory conditions regarding repairs or other services performed by component activities which cannot be promptly resolved between the commanding officer of the ship concerned and the commanding officer of the component activity, the matter shall be referred to the Commandant, PRNC, in his capacity and responsibility for coordinating services within the PRNC.

8. The internal organization of the U.S. Naval Gun Factory shall include the following main departments: Design, Planning, Production, Inspection, Public Works, Supply, Fiscal (including accounting and disbursing), Medical and Administration (including matters of military personnel administration, security, fire protection, communications, plant protection, and various other administrative services required by the departments of the Gun Factory). In addition, there shall be attached to the staff of the Super-

intendent an Industrial Relations Division (to handle matters of the civilian personnel administration) and a Management Planning and Review Division. The detailed organization and functions of the departments and divisions of the Gun Factory shall be determined jointly by the Superintendent, Naval Gun Factory, and the cognizant agencies of the Navy Department.

9. All directives, regulations, and instructions which conflict with the foregoing are hereby modified.

10. The Chief of Naval Operations shall place the provisions of this general order in effect not later than 1 December 1945.

JAMES FORRESTAL
Secretary of the Navy

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(EXHIBIT D)

0701. Responsibility of the Commanding Officer.

1. The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his responsibility, subject to the limitations prescribed by law and these regulations. While he may, at his discretion, and when not contrary to law or regulations, delegate authority to his subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his continued responsibility for the safety, well-being, and efficiency of his entire command.

170. 0704. Effectiveness for Service.

The commanding officer shall:

1. Exert every effort to maintain his command in a state of maximum effectiveness for war service consistent with the degree of readiness prescribed by proper authority.

171 0713. Security of Classified Matter.

The commanding officer shall require that orders and regulations pertaining to the security of registered publications, and of classified documents, material, and information are strictly observed.

172 0733. Rules for Visits.

1. The commanding officer shall not permit foreigners or representatives of foreign activities to make inspections on board naval vessels or aircraft or at naval activities, or to inspect work being done or material assembled or stored for the Naval Establishment at private manufacturing establishments, shipyards, or other places without specific permission of the Chief of Naval Operations. When such permission has been given, he shall detail an officer to accompany the visitor, and following the inspection shall advise the Chief of Naval Operations by letter as to the details of what was shown and what was refused.

2. Unless specific permission has been granted by the Chief of Naval Operations, the commanding officer shall not permit visitors to make other than casual inspections on board naval vessels or aircraft or at naval activities, or in those portions of private establishments where work is being done or material assembled or stored for the Naval Establishment.

3. Commanding officers and others officially concerned shall exercise reasonable care to safeguard the persons and property of visitors to naval activities.

0734. Dealers, Tradesmen, and Agents.

In general, dealers or tradesman or their agents shall not be admitted within a command, except as authorized by the commanding officer:

1. To conduct public business.
 2. To transact specific private business with individuals at the request of the latter.
 3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command.
- . . .

173 1502. Control of Classified Matter.

1. The Chief of Naval Operations shall supplement these regulations with appropriate publications including the Security Manual, Registered Publications Manual, Communication Instructions, and such other detailed instructions as are necessary to insure proper control of classified matter, including cryptographic systems and procedures. All such publications and instructions shall have the full force and effect of these regulations.
- . . .

175

(EXHIBIT E)

0733. Rules for Visits.

1. Commanding officers are responsible for the control of visitors to activities of the Department of the Navy and shall comply with the relevant provisions of the U. S. Navy Security Manual for Classified Matter and other pertinent directives.

2. Commanding officers shall take such measures and impose any restrictions on visitors as necessary to safeguard the classified matter under their jurisdiction. Ar-

rangements for general visiting shall always be based on the assumption that foreign agents will be among the visitors.

3. Commanding officers and others officially concerned shall exercise reasonable care to safeguard the persons and property of visitors to naval activities.

0734. Dealers, Tradesmen, and Agents.

In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

1. To conduct public business.
2. To transact specific private business with individuals at the request of the latter.
3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently available to the personnel of the command.

176 1502. Control of Classified Matter.

The Chief of Naval Operations shall supplement these regulations with detailed instructions to insure the proper control of classified matter. Such instructions shall include the United States Navy Security Manual for Classified Matter, Registered Publication Manual, Communication Instructions, Armed Forces Industrial Security Regulation and such others as may from time to time be issued. All such publications shall have the full force and effect of these Regulations.

Chapter 14

VISITOR CONTROL

1401. RESPONSIBILITY:

1. The Chief of Naval Operations is responsible for the formulation and promulgation of the policy governing visits to activities of the Naval Establishment.

2. Officers in a command status shall be responsible for the security control of visitors within the limits of their jurisdiction. They shall promulgate such additional directives as are necessary for the control of visitors within their respective commands.

1402. VISITORS

The term "visitors" as used herein for security purposes applies as follows:

1. A visitor on board ship or aircraft is any person who is not a member of the ship's company or not a member of a staff using the ship as a flagship.

2. A visitor to a naval shore establishment is any person who is not attached to or employed by the command or staff using that station as headquarters.

1403. CATEGORIES OF VISITORS

Persons who are considered visitors as described in article 1402 are divided into four basic categories which are further subdivided as follows:

Category One United States citizens except those representing a foreign government or a foreign private interest.

Able Department of Defense and United States Coast Guard personnel (military and civilian).

* Baker Personnel of private facilities under contract to the Department of Defense.

Charlie Employees of other United States Government activities who are participating in Navy programs.

Category Two United States citizens not described in Category One.

Able Representatives of a foreign military service.

Baker Representatives of a foreign government or private interest.

Charlie Other United States citizens.

Category Three Foreign nationals (including foreigners in the United States on nonimmigration visas).

Able Representatives of a foreign military service.

Baker Representatives of a foreign government or private interest.

Charlie Foreign nationals in the United States sponsored by a military department, or other foreign nationals employed on military projects, either as contractor's employees or departmental employees.

Dog Other foreign nationals.

Category Four Immigrant aliens (foreigners in the United States on immigration visas).

1404. VISIT CLEARANCES

1. Visits to activities of the Naval Establishment by persons who will not have access to classified matter need no authorization from the Chief of Naval Operations. The commanding officer concerned is responsible for the decisions and conditions under which such visits are permitted. Although the visit is unclassified, all visitors in categories Two Able, Two Baker, and Three shall be accompanied by a competent escort (refer to article 1411), except when

general visiting is in progress (refer to articles 1412 and 1413).

179 2. Visits to activities of the Naval Establishment by persons who will have access to classified matter shall be processed in accordance with the requirements of table C and article 1405 below.

A visitor will be considered to have "access" to classified matter when he is permitted to gain knowledge of such matter through observation or discussion. This term is also interpreted to mean that a visitor will have access when classified matter is exposed in such a manner in the space being visited, or en route to the space to be visited, that he will gain knowledge through observation alone.

3. The column headings are explained as follows:

a. Column 1, Category of Visitor—The "category of visitor" is as described in article 1403.

b. Column 2, Application Made By—This column sets forth the person designated to initiate the request for the visit clearance. Applications shall be made by letter or, if time does not allow, by message. They shall be submitted sufficiently in advance to permit necessary arrangements to be made.

c. Column 3, To—This column specifies the cognizant officer to whom the application for clearance shall be addressed and who shall approve or disapprove the visit.

d. Column 4, Via—In this column is set forth the chain of command from the originator to the final approving authority.

e. Column 5, Information Required—Certain information is required before final approval can be given. (Refer to article 1405.).

181 1409. RESPONSIBILITIES OF THE COMMAND
BEING VISITED

1. The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted. The granting of "approval" or "clearance" for a visit, even though emanating from higher authority than the command being visited, shall be interpreted as an indication that competent authority has no objection to the visit at the time and under the conditions specified and that the visit is subject to the convenience of the command to be visited.

2. The term "subject to local restrictions", when used in connection with the approval of visits, shall be interpreted to mean that the commanding officer of the activity being visited may impose any restrictions or limit the purpose of the visit to any degree necessary for the command to properly exercise his responsibility of safeguarding the classified matter under his jurisdiction.

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(EXHIBIT G)

20 August 1954

Number 5200.8

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Authority of Military Commanders under the Internal Security Act of 1950 to Issue Security Orders and Regulations for the Protection of Property or Places under Their Command

Reference: (a) Secretary of Defense Memorandum, dated 11 May 1951, Subject: "Authority of Military Commanders Under the Internal Security Act of 1950 to Issue Security Orders and Regulations for the Protection of Property or Places Under Their Command"

I. PURPOSE

The purpose of this Directive is:

- A. To designate military commanders to promulgate regulations for the protection of property or places under their command, pursuant to the provisions of Section 21 of the Internal Security Act of 1950 (Public Law 831, 81st Congress).
- B. To reissue in directive form the provisions of Reference (a) in order to comply with Section VI of Department of Defense Directive 5025.1, dated 2 February 1954, subject: "Department of Defense Directives System".

II. CANCELLATION

Reference (a) is cancelled and superseded by this Directive.

III. BACKGROUND

- A. Section 21 of the Internal Security Act of 1950 states:

"797. Security regulations and orders; penalty for violation" O

(a) Whoever willfully shall violate any such regulation or order as, pursuant to lawful authority, shall be or has been promulgated or approved by the Secretary of Defense, or by any military commander designated by the Secretary of Defense, or by the Director of the National Advisory Committee for Aeronautics, for the protection or security of military or naval aircraft, airports, airport facilities, vessels, harbors, ports, piers, water-front facilities, bases, forts, posts, laboratories, stations, vehicles, equipment, explosives, or other property or places subject to the jurisdiction, administration, or in the custody of the Department of Defense, any Department or agency of which said Department consists, or any officer or employee of said Department or agency,

or of the National Advisory Committee for Aeronautics or any officer or employee thereof, relating to fire hazards, fire protection, lighting, machinery, guard service, disrepair, disuse or other unsatisfactory conditions thereon, or the ingress thereto or egress or removal of persons therefrom, or otherwise providing for safeguarding the same against destruction, loss, or injury by accident or by enemy action, sabotage or other subversive actions, shall be guilty of a misdemeanor and upon conviction thereof shall be liable to a fine of not to exceed \$5,000 or to imprisonment for not more than one year, or both.

“(b) Every such regulation or order shall be posted in conspicuous and appropriate places. Sept. 23, 1950, c. 1024, Title I, Par. 21, 64 Stat. 1005.”

IV. DESIGNATION OF AUTHORITY

The following military commanders are hereby designated as having the authority to promulgate the necessary regulations pursuant to paragraph III above.

- A. Commanding officers of all military reservations, posts, camps, stations, or installations subject to the jurisdiction, administration, or in the custody of the Department of the Army.
- B. Commanding officers of all naval ships, stations, activities and installations; and commanding officers of all Marine Corps posts, stations, and supply activities, subject to the jurisdiction, administration, or in the custody of the Department of the Navy.
- C. Commanders of major air commands, numbered air forces, air divisions, wings, groups and installations, subject to the jurisdiction, administration, or in the custody of the Department of the Air Force.

V. PROMULGATION OF REGULATIONS

- A. Regulations promulgated by military commanders designated hereby shall be in accordance with policies and procedures relative thereto established by the Secretary of the Military Department concerned.
- 185 B. Regulations issued pursuant hereto shall be posted in a conspicuous and appropriate place, and shall make appropriate citation of this designation and the Public Law under which the designation is made.

VI. EFFECTIVE DATE

This Directive is effective immediately.

C. E. WILSON
Secretary of Defense

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Filed March 14, 1958

Affidavit of Plaintiff Rachel M. Brawner

I, Rachel M. Brawner, plaintiff in the above matter, being duly sworn, depose and say that:

1. At no time during the full period of my employment at the Bellevue Annex Cafeteria of the Naval Gun Factory, when I came to work each morning, was I ever escorted by any one from the gate of the Bellevue Annex to Building 65 (the place within the Annex where the cafeteria is located and where I worked). I was never escorted from Building 65 to the gate when I left work each afternoon. I had no escort at any time during any part of the day that I was within the Bellevue Annex.

2. At the time I first stated working at the Annex, before the guards came to know me, upon approaching the

gate in the morning to go to work, I placed my identification badge, which was suspended on a chain, about my neck. I walked through the gate without ever being stopped and proceeded directly to my place of work. The guard could observe the badge on me. He never inspected it. After I became known to the guards, I didn't put the identification badge on, because the guards knew me and let me through just on seeing me.

The same thing happened when I left work in the afternoon. At first, I put the badge on me, but after the guards came to know me, that wasn't necessary.

At no time while I was working in the cafeteria did I wear the identification badge.

3. For the full six and one-half years before my discharge on November 15, 1956, except for vacations, 187 holidays, and very infrequent absences, I worked everyday at the Bellevue Annex Cafeteria, Monday through Friday, from 6:00 a.m. to 3:00 p.m.

/s/ RACHEL M. BRAWNER
Rachel M. Brawner

Sworn to and subscribed before
me this 11th day of March, 1958.

/s/ CECIL F. GIBSON
Notary Public, District of Columbia

My commission expires 6/14/60.

Filed March 14, 1958

Affidavit of Oliver T. Palmer

I, Oliver T. Palmer, being duly sworn, depose and say that:

1. I am business agent of the plaintiff Union in the above matter. I have occupied that position since February 1943.

2. The number of employees within the bargaining unit at the Naval Gun Factory cafeterias represented in collective bargaining by the Union ranges between 30 and 35 employees.

3. A few days before January 16, 1958, Harold R. Baker telephoned me to say that he and Claude S. Breeden, Jr., desired to confer with me. Until a few months before then, Harold R. Baker had been supervisor of the cafeterias operated by Defendant M & M Restaurants, Inc. at the Naval Gun Factory, and Claude S. Breeden had been secretary of M & M Restaurants, Inc.

4. A conference was held on January 16, 1958, at the Union's headquarters, attended by Breeden, Baker, myself, and Angus Bea, president of the Union. Baker stated that a new corporation had been formed called Inplant Foods Incorporated; that the two officers of Inplant Foods Incorporated were Baker, who was President and Treasurer, and Breeden, who was Vice-President and Secretary; and that as of February 1, 1958, Inplant Foods Incorporated was taking over the operation of the cafeterias at the Naval Gun Factory.

The remainder of the conference was devoted to discussing and reaching agreement upon the status of the Union, the existing collective bargaining agreement, and Plaintiff Rachel M. Brawner. Baker stated that Inplant Foods Incorporated recognized the Union as the exclusive

bargaining representative of the employees working
 189 at the cafeterias of the Naval Gun Factory. Baker
 asked that I send to him a letter incorporating the
 understanding reached on that day between the Union and
 Inplant Foods Incorporated upon the various matters dis-
 cussed; and that he would like to have the letter by Janu-
 ary 22, and at least no later than January 23, 1958, in
 order to have it when he met with the Board of Governors
 of the Naval Gun Factory Cafeterias on January 24, 1958.

On January 21, 1958, I sent Baker a letter incorporating
 the agreement that had been reached. A true copy of the
 January 21, 1958, letter is attached hereto as Exhibit A.
 Under date of February 14, 1958, Baker sent me a letter
 expressing concurrence in my letter of January 21, 1958.
 A true copy of the February 14, 1958, letter is attached
 hereto as Exhibit B. On February 19, 1958, I sent Baker
 a further letter, a true copy of which is attached hereto
 as Exhibit C, in reply to his letter of February 14, 1958.

Among the items agreed upon was that which pertained
 to Plaintiff Rachel M. Brawner. As expressed in item 4 of
 the January 21, 1958 letter (Exhibit A), it was agreed be-
 tween the Union and Inplant Foods Incorporated that:

The new company will reinstate Mrs. Rachel Brawner
 with retroactive seniority rights, and further accumu-
 lation thereafter, if, as a result of the pending suit
 in the United States District Court by the Union
 against certain government officials and M & M Res-
 taurants, Inc. it is held in effect that M & M Res-
 taurants, Inc. or said government officials acted with-
 out legal authority. The new company shall, however,
 not be liable for back pay, except for back pay accru-
 ing after any breach by it of its refusal to reinstate
 Mrs. Brawner as required by this paragraph.

5. On February 24, 1958, and March 4, 1958, meetings
 were held between the Union and Inplant Foods Incorporated
 to negotiate a collective bargaining agreement to
 succeed the existing collective bargaining agreement due

to expire March 15, 1958. It was agreed between parties to extend the existing collective bargaining agreement as is to June 15, 1958, and to begin negotiations for a succeeding agreement not later than the first week of June 1958.

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/s/ OLIVER T. PALMER
Oliver T. Palmer

Sworn to and subscribed before me
this 12 day of March, 1958.

/s/ JOSEPH H. MILLER

Notary Public, District of Columbia

My commission expires 11/30/59.

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(EXHIBIT A)

January 21, 1958

Mr. H. R. Baker, President & Treasurer
Inplant Food Incorporated
513 Belvedere Boulevard
Silver Spring, Maryland

Dear Mr. Baker:

This letter confirms points agreed to in conference held on January 16 with you and Mr. Breeden:

1. The new company is to assume all obligations of the current collective bargaining agreement between the Union and M & M Restaurants, Inc. This includes full recognition of accumulated seniority rights and the continuance thereof, of all employees covered by the agreement.
2. The new company recognizes and accepts for all purposes the notice sent by the Union to M & M Restaurants, Inc. dated January 13, 1958 (copy enclosed), as binding upon Inplant Food Incorporated.

3. The Union will recognize and accept certain rules outlined in the Concessionaire Agreement so far as the same are not in violation of the law.
4. The new company will reinstate Mrs. Rachel Brawner with retroactive seniority rights, and further accumulation thereafter, if, as a result of the pending suit in the United States District Court by the Union against certain government officials and M & M Restaurants, Inc. it is held in effect that M & M Restaurants, Inc. or said government officials acted without legal authority. The new company shall, however, not be liable for back pay, except for back pay accruing after any breach by it of its refusal to reinstate Mrs. Brawner as required by this paragraph.
5. It is further understood that this agreement is without prejudice to the rights of the Union or of Mrs. Brawner in connection with the said suit against certain government officials and M & M Restaurants, Inc., and it is not to be construed as any waiver of rights thereunder.

Very truly yours,

OLIVER T. PALMER
Business Agent

Effective date of the above February 1, 1958

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(EXHIBIT B)

INPLANT FOODS, INC.
WASHINGTON, D. C.

February 14, 1958

Mr. O. T. Palmer, Business Agent
Cafeteria and Restaurant Workers Union
1438 You Street, N. W.
Washington 9, D. C.

Dear Mr. Palmer:

This will acknowledge receipt and concurrence with your letter of January 21, 1958, wherein we agreed to certain conditions relative to the agreement between the Cafeteria workers and management within the U. S. Naval Gun Factory. However, we wish to detail Item 3 as follows:

1. The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this agreement. In no event shall the Concessionaire engage, or continue to engage, for operations under this agreement, personnel who
 - (a) fail to pass satisfactory medical examinations where the handling of food is involved
 - (b) are not courteous, conscientious and competent to perform the duties to which they are assigned
 - (c) fail to meet the security requirements or other requirements under applicable regulations of the

Activity, as determined by the Security Officer of the Activity.

Very truly yours,

INPLANT FOODS, INC.

/s/ HAROLD R. BAKER
Harold R. Baker
President

HRB/dw

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(EXHIBIT C)

February 19, 1958

Mr. Harold R. Baker, President
Inplant Foods, Inc.
Naval Gun Factory Cafeterias
8th and M Streets, S. E.
Washington 25, D. C.

Re: Communication dated
February 14, 1958

Dear Mr. Baker:

Reference is made to your letter of acknowledgement and concurrence with our letter of January 21, 1958 in which you detail your expressed wish concerning Item 3 of our agreement reached in our conference held on January 16, 1958.

Please be advised that our Union will accept the inclusion in the new collective bargaining agreement of the following provision from the Concessionaire Agreement to the extent that the same does not conflict with the law:

1. The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pur-

suant to the operation under this agreement. In no event shall the Concessionaire engage, or continue to engage, for operations under this agreement, personnel who

(a) fail to pass satisfactory medical examinations where the handling of food is invalued involved.

(b) are not courteous, conscientious and competent to perform the duties to which they are assigned

(c) fail to meet the security requirements or other requirements under applicable regulations of the
195 Activity, as determined by the Security Officer of the Activity.

Very truly yours,

OLIVER T. PALMER
Business Agent

(Filed April 14, 1958)

Affidavit of Denver E. McKaye.

Denver E. McKaye, President of M & M Restaurants, Inc., a Maryland corporation, being duly sworn doth depose and make oath to the following facts:

That he is President of M & M Restaurants, Inc., and has been President of said corporation since prior to November 1, 1956; that there was in the employ of said corporation on November 1, 1956 at the Naval Gun Factory, Washington, D. C., one Rachel M. Brawner, who had been employed by said corporation for some period of time, and whose work was generally satisfactory; that on or about November 14, 1956, M & M Restaurants, Inc., was notified by the Board of Governors of the Naval Gun Factory that the Security Officer thereof had demanded that Rachel M.

Brawner surrender her identification badge for admittance to the premises and that, therefore, she could not be admitted to the cafeteria on the premises of the Gun Factory for employment.

That Rachel M. Brawner was at that time a member of the Cafeteria and Restaurant Workers Union, Local 473, affiliated with the AFL-CIO, and that said union made demand, on her behalf, for an explanation of the above action; that M & M Restaurants, Inc., could not place her on the rolls of employees for that cafeteria as she was unable to enter the premises, because of the official action of the Board of Governors and the Security Officer of the Naval Gun Factory.

That as result thereof, an exchange of correspondence took place between M & M Restaurants, Inc., and Oliver T. Palmer, Business Agent for the Cafeteria and Restaurant Workers Union, Local 473, and pursuant thereto a personal conference occurred among your deponent, Oliver T. Palmer, a Mr. Bea, President of said local and, to the best of the recollection and belief of your deponent, Harold Baker, Cafeteria Supervisor for M & M Restaurants, Inc.; that at said meeting, the position of M & M Restaurants, Inc., was explained and reiterated by your deponent and your deponent suggested that in order to assure his cooperation in the matter, he would employ Rachel M. Brawner at another location where M & M Restaurants, Inc., operated a food service establishment, namely, the Skylark Motel, Springfield, Virginia; that Oliver T. Palmer, on a date subsequent to said meeting notified your deponent that Rachel M. Brawner was not interested in accepting the proffered employment at The Skylark Motel because of the location of the said The Skylark Motel and that said alternate employment was therefore refused by Oliver T. Palmer on behalf of Rachel M. Brawner. That to the best of the recollection and belief of the deponent, said meeting

and subsequent reply took place between December 1 and December 16, 1956.

DENVER E. MCKAYE,
President M & M Restaurants, Inc.

Subscribed and sworn to this 13th day of March, 1958.

Notary Public

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(Filed July 30, 1958)

**Order Granting Defendants' Cross-Motion for
Summary Judgment**

This cause having been heard on plaintiffs' motion for summary judgment and defendants' motion to dismiss or cross-motion for summary judgment, and the Court having considered all of the record, the pleadings, affidavits, exhibits, and memoranda of points and authorities filed herein and there having been a full and complete hearing and the Court having found that there is no genuine issue as to any material fact and that the defendants are entitled to judgment as a matter of law, it is now, therefore, by the Court this 21 day of July, 1958

ORDERED, that the plaintiffs' motion for summary judgment be, and the same hereby is, denied; and it is

FURTHER ORDERED, that the defendants' cross-motion for summary judgment be, and the same hereby is, granted, and that the complaint be, and the same hereby is, dismissed as to all defendants with costs to the defendants.

/s/ EDWARD M. CURRAN
United States District Judge

(Filed August 14, 1958)

Notice of Appeal

Notice is hereby given that Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, and Rachel M. Brawner, plaintiffs herein, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the order entered on the docket in this action on July 30, 1958.

BERNARD DUNAU**Bernard Dunau**

912 Dupont Circle Building, N. W.

Washington 6, D. C.

Attorney for plaintiffs-appellants

Dated at Washington, D. C., this 13th day of August, 1958.

[fol. 134]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Appellants

v.

NEIL H. McELROY, Individually, and as Secretary of
Defense, et al., Appellees

Appeal from the United States District Court
for the District of Columbia

OPINION—Decided August 21, 1959

Withdrawn by order of the Court—April 18, 1960

Mr. Bernard Dunau for appellants.

Mr. DeWitt White, Attorney, Department of Justice, of the bar of the Supreme Court of West Virginia, *pro hac vice*, by special leave of court, with whom *Messrs. Leo J. Michaloski, Jerome L. Avedon, and Justin R. Rockwell*, Attorneys, Department of Justice, were on the brief, for appellees.

Before EDGERTON, FAHY, and DANAHER, *Circuit Judges*.

EDGERTON, *Circuit Judge*: A private corporation, M & M Restaurants, Inc., under a contract with government officers, operated a cafeteria in the Naval Gun Factory, property of the United States. The corporation employed [fol. 135] appellant Brawner, a civilian, as a cook. Without a hearing of any sort, the Superintendent and the Security Officer of the Naval Gun Factory excluded her from the premises and thereby deprived her of her job. They said

she did not meet the "security requirements". No one told either her or the corporation which employed her what the security requirements were, or why she was believed not to meet them. The employer asked for "a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner." The request was refused.

Brawner and her labor union sued the Secretary of Defense, the Secretary of the Navy, the Superintendent and the Security Officer of the Gun Factory, and also Brawner's employer, for the loss of her job, and have appealed from a summary judgment dismissing the complaint.

Except with respect to the employer, the District Court erred. This has now become clear. On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds, "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene v. McElroy*, 360 U.S. 474, — (Slip op. pp. 33-34). What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

It is immaterial that Greene's working place does not appear to have been, as Brawner's was, on government property. From the premise that "the United States could validly exclude all persons from access to the Naval Gun Factory", appellees draw the conclusion that the Secretary [fol. 136] of Defense could validly exclude Brawner from her work there, on "security" grounds, without giving her a hearing. If the conclusion followed from the premise, it would likewise follow that the Secretary could deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work. But neither Congress nor the President has authorized any such thing. And it is clear that government officials may not deprive government employees of their jobs on security grounds except as

authorized by Congress or the President. *Peters v. Hobby*, 349 U.S. 331; *Cole v. Young*, 351 U.S. 536.

The government challenges the standing of appellant labor union to sue. We think the union here had standing to protect the interests of its members.¹ Cf. *Nat'l Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 459-460; *MacArthur Liquors, Inc. v. Palisades Citizens Ass'n*, — U.S.App.D.C. —, 265 F. 2d 372.

Since Brawner's employer could not employ her within the Naval Gun Factory, the only place where it had contracted to employ her, when the government appellees would not let her enter the place, it is not responsible for ceasing to employ her. Appellants' claim against the employer is for alleged breach of contract, and impossibility of performance defeats the claim. The judgment in favor of M & M Restaurants, Inc., is therefore affirmed. The judgment in favor of the government appellees is reversed and the case is remanded to the District Court for proceedings consistent herewith.

So ordered.

FAHY, Circuit Judge, concurring: I have concurred in Judge Edgerton's opinion, but in view of the dissenting portion of Judge Danaher's opinion I add these words of my own.

As has been pointed out, appellant Brawner was a privately employed cook in the cafeteria, conducted with Government agreement by M & M Restaurants, Inc., on the premises of the Naval Gun Factory. None of the papers before us indicates that she had access to classified information or to any restricted part of the Naval Gun Factory which posed a security problem over and above that affect-

¹ The union was the recognized representative of the employees of M & M Restaurants, Inc., under a collective bargaining agreement between the union and the Restaurants. The agreement authorized the union to participate in any dispute arising thereunder, including a dispute over discharge of any employee. When Implant Foods, Inc., replaced the Restaurants as the operator of the cafeteria, the new collective bargaining contract included a provision whereby Implant agreed to reinstate appellant with full rights should this suit be determined in her favor. Cf. *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 283.

ing her as a cook in the cafeteria. Under settled law, recently expounded by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, the right to hold specific private employment comes within the "property" protected by the Due Process Clause of the Fifth Amendment against unreasonable governmental interference. The question before us, therefore, is not whether the Government can control access to the Naval Gun Factory, which of course it can do, but whether the control it exercised in this instance, which caused the loss of the cook's employment in the cafeteria, conformed with the requirements of the Due Process Clause. The location of the employment is a relevant circumstance on the issue of due process of law, but does not dispense with the issue. Since we are a government of law, and I can find no authority in any law, Executive Order or [fol. 138] regulation which authorized the deprivation of this cook's employment in the manner in which it occurred, for that reason alone I think the deprivation was invalid, as in *Greene*.

Appellant Brawner was not a visitor or a tradesman or tradesman's agent within the meaning of the regulations controlling the access of these persons to the premises. She was not an employee of the Navy, and so was accorded none of the benefits of the clearance regulations applicable to such an employee in security matters. She was simply deprived of her employment out of hand, without notice, hearing, opportunity to be heard, or statement of reason except that she did not meet "security requirements." Even were this authorized by some law or competent authority I do not see how it could be squared with due process of law. Due process of law requires a reasonable procedure; and to be reasonable a procedure must be such as reason is able to appraise in all the circumstances as fair; and in order for reason to do that I think the procedure must at least in the circumstances before us disclose to the person affected enough of the basis for the action to enable her to test its truth, with an opportunity in some manner to do so.

We do not decide that confrontation and right of cross-examination were essential, the question reserved by the Supreme Court in *Greene*, for here as there that question

is not reached because in any event the manner of deprivation of employment was unauthorized and in this case was otherwise unreasonable as well. Since it was unauthorized and unreasonable due process of law was lacking in both respects.

We are not concerned with truck drivers and others mentioned by my brother Danaher; none of these complains of having been deprived of his employment by governmental action. If any were to do so, we might have a question like the one we do have. Finally, I do not understand [fol. 139] the relevance of the reference in the dissenting opinion to the authority of the Superintendent to bar a petty thief or a numbers player or a narcotic peddler, or other unfit person. But when any deprivation of liberty or property does involve such as these the courts do not withhold from them the application of the Due Process Clause. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty or property without due process of law."

DANAHER, *Circuit Judge*: I concur specifically in the majority's opinion affirming the judgment in favor of M & M Restaurants, Inc. Otherwise I dissent.

To say that some officials may have abused their authority is not to deny that authority exists. This is not such a situation as was presented in *Greene v. McElroy*, 360 U.S. 474. The property here is owned by the Government and is part of the naval establishment. Control of access to the Naval Gun Factory has legally been vested in the Superintendent. When the public may enter and for what purposes and under what circumstances may be determined by that officer, in accordance with governing regulations. Congress has even made it a criminal offense, under some circumstances, for unauthorized personnel to be upon the premises. 18 U.S.C. § 1382 (1952).

The basic principle of control by the Government of its own naval establishment is here paramount, I think. Truck drivers, plumbers, telephone operators, electricians, artisans in every walk of life, in one way or other and at one time or other may have legitimate business with

a naval base, but the privilege of access is to be extended and may be continued only as those charged with maintaining the security of the Government's operation may by regulation prescribe. If some petty thief or numbers [fol. 140] player or narcotics peddler or otherwise unfit person should insist upon continuance of a previously extended privilege of access, I think the regulations authorize the Superintendent to bar him.

I am unable to conclude that regulations under which the officials here acted were invalid or unauthorized. Particularly do I dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for "confrontation and cross-examination" of sources whose reports may have led to revocation of the privilege of access to the Government's enclave.

[fol. 141] Petition for Rehearing En Banc (omitted in printing).

[fol. 156] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER GRANTING PETITION FOR REHEARING EN BANC—
October 26, 1959

Upon consideration of appellees' petition for a rehearing en banc, it is

Ordered by the court that the petition for rehearing en banc is granted and that this case shall be scheduled for hearing before the court on November 9, 1959.

Per Curiam.

Dated: October 26 1959

Circuit Judges, Edgerton, Bazelon and Fahy would deny the petition.

[fol. 157]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

MOTION TO SUPPLEMENT RECORD—Filed February 3, 1960

Appellants move the Court to supplement the record in the following respects:

1. The action in this case was commenced against Defendant Thomas S. Gates individually and as Secretary of the Navy. Defendant Thomas S. Gates was confirmed as Deputy Secretary of Defense on May 18, 1959, and appointed as Secretary of Defense on December 2, 1959. The action against Defendant Thomas S. Gates continues therefore individually and as Secretary of Defense.

2. The action was commenced against Neil H. McElroy individually and as Secretary of Defense. On December 1, 1959 Defendant McElroy resigned as Secretary of Defense. The action therefore continues against Defendant Neil H. McElroy individually in order to recover against him damages for the harm inflicted by his performance of an unauthorized act.

Wherefore this motion to supplement the record to show the foregoing matters should be granted.

Bernard Dunau, 912 Dupont Circle Building, N.W.,
Washington 6, D.C., Attorney for Appellants.

Certificate of Service (omitted in printing).

[fol. 158]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ANSWER TO APPELLANTS' MOTION TO SUPPLEMENT RECORD—
Filed February 5, 1960

The appellees answer the "Motion to Supplement Record" as follows:

1. Appellees do not object to an order amending the title of this action to describe appellee Gates as now Secretary of Defense.

2. Appellees suggest that as against appellee McElroy in his capacity of Secretary of Defense the action has abated and an order to that effect should be entered.

3. Insofar as it may be an allegation of fact appellees deny the statement in said motion that: "The action therefore continues against Defendant Neil H. McElroy individually in order to recover against him damages for the harm inflicted by his performance of an unauthorized act." The appellees have always taken the position that neither appellee McElroy, nor any of the governmental appellees is liable individually to the appellants, or either of them, and that question is one of the issues now under consideration [fol. 159] by the Court on this appeal. (See our brief, pp. 36-37.) In view of Mr. McElroy's resignation from the office of Secretary of Defense, it is respectfully submitted that the action as to him should abate, and not be continued against him in his individual capacity as suggested by appellants.

J. Walter Yeagley, Assistant Attorney General;
George B. Searls, De Witt White, Attorneys, Department of Justice, Attorneys for Appellees.

February 5, 1960

Certificate of Service (omitted in printing):

[fol. 160] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

REPLY TO ANSWER TO APPELLANTS' MOTION TO
SUPPLEMENT RECORD—Filed February 9, 1960

Appellants oppose appellees' position that, as to defendant Neil H. McElroy, "the action as to him should abate, and not be continued against him in his individual capacity as suggested by appellants."

Appellees apparently confuse two matters: (1) the right to continue the action against defendant McElroy to recover money damages from him, with (2) the separate question whether, as a matter of substantive law, defendant McElroy is answerable in money damages. The present motion is concerned solely with defendant McElroy's continued status as a party to this action. Whether the record establishes a claim against defendant McElroy upon which relief can be granted in the way of money damages is not a question involved in the present motion. The latter matter is covered in appellees' brief at pages 36 to 37 and in appellants' brief at page 54, note 24. It should be observed that *Barr v. Matteo*, 360 U.S. 564 and *Howard v. Lyons*, 360 U.S. 593 are consistent with appellants' position, for appellants maintain that appellees inflicted damage by their performance of an unauthorized act, unlike the latter cases in which the Supreme Court found that the act was authorized and that recovery cannot be had for the performance of an authorized act whether or not the motive for engaging in it was proper or improper.

Respectfully submitted,

Bernard Dunau, 912 Dupont Circle Building, N.W.,
Washington 6, D.C., Attorney for Appellants.

[fol. 161] Certificate of Service (omitted in printing).

[fol. 162] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER DENYING MOTION TO SUPPLEMENT RECORD WITHOUT
PREJUDICE—April 25, 1960

Upon consideration of appellants' motion to supplement the record, wherein it is requested that this action continue against Neil H. McElroy individually, of appellees' answer and of appellants' reply, it is

Ordered by the court that the motion to supplement the record is denied, without prejudice to filing by appellants of a motion to substitute party appellees as provided for by Rule 25(d) of the Federal Rules of Civil Procedure and without prejudice to filing by appellees of a motion to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity.

Per Curiam.

Dated: April 25, 1960

[fol. 163]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 14689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Appellants

v.

NEIL H. McELROY, Individually and as Secretary of
Defense, et al., Appellees

Appeal from the United States District Court
for the District of Columbia

OPINION ON REHEARING EN BANC—April 14, 1960

Decided April 14, 1960

Mr. Bernard Dunau for appellants.

Assistant Attorney General Yeagley, of the bar of the Supreme Court of Indiana, *pro hac vice*, by special leave of court, with whom *Messrs. Leo J. Michaloski, Jerome L. Avedon, and Justin R. Rockwell*, Attorneys, Department of Justice, were on the brief, for appellees. *Mr. George B. Searls*, Attorney, Department of Justice, also entered an appearance for appellees.

Before PRETTYMAN, Chief Judge, and EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BASTIAN, and BURGER, Circuit Judges.

[fol. 164] PRETTYMAN, *Chief Judge*: Rachel M. Brawner was a short-order cook—a “breakfast cook”. In November, 1956, she worked in a cafeteria. Her duties were to prepare breakfast and lunch, attend the steam table, and wash dishes. She had been so employed for six and a half years. The cafeteria is located on Government property, the prem-

ises of the Naval Gun Factory. The land had been purchased by the United States in 1873. It is located in the District of Columbia and became part of the Gun Factory in 1945. The work of the Factory includes, *inter alia*, design, planning, production and inspection of naval ordnance.

The cafeteria was operated by a private corporation, M & M Restaurants, Inc., under a written contract with the Board of Governors, U. S. Naval Gun Factory Cafeterias. The Board of Governors is composed of seven civilian governmental employees of the Factory and is appointed by the Superintendent. M & M Restaurants, Inc., operates numerous cafeterias and restaurants in several states, including Delaware, Maryland and Virginia. It operates the three main cafeterias at the Gun Factory. In order to enter or leave the premises of the Gun Factory, an identification badge is required. The issuance of this badge is by the Security Officer of the Gun Factory, a subordinate of the Superintendent, both of whom are naval officers. The Gun Factory is a component activity of the Potomac River Naval Command. The Commandant of this Command is directly responsible to the Chief of Naval Operations.

Rachel Brawner was required to have, and did have, an identification badge. On November 15, 1956, she was notified by her supervisor that he had been told to pick up her badge "for security reasons". She surrendered her badge to him. This action of the supervisor was pursuant to a phone call from a representative of the Board of Governors to a representative of M & M-Restaurants, Inc. The caller stated that the Board had been notified by the [fol. 165] Security Officer of the Naval Gun Factory, a Lieutenant Commander, that Brawner would have to surrender her badge and would not be permitted to enter the Factory "until clearance is certified by the Security Officer."

The President of M & M Restaurants, Inc., offered Brawner employment at the Skylark Motel in nearby Springfield, Virginia, where a restaurant was operated by the company. The representative of the Union, on behalf of Brawner, notified the company that she was not interested in accepting the proffer.

The Chairman of the Board of Governors made a request of the Superintendent of the Factory that a meeting be arranged for the Security Officer, the Board of Governors, representatives of M & M Restaurants, Inc., and agents of the Union to discuss the action relative to Brawner. The Superintendent replied that the agreement between the Board of Governors and M & M Restaurants, Inc., stipulated that the latter should employ only those who met the security requirements for admission to the Factory and that it was considered that Brawner "does not meet these security requirements". The Superintendent added that the proposed meeting was therefore unnecessary.

In the meantime Brawner had called upon the business agent of the local of the Union which was the bargaining representative of the cafeteria workers. This representative discussed the matter with the President of M & M Restaurants, Inc. The contract between the Union and the company provided that the employer would not suspend or discharge any employee without good and sufficient cause.¹ It further provided that in the event of a dispute the matter should be referred to a board of arbitration of three parties, one of whom might be chosen by the American Arbitration [fol. 166] Association.² The representative of the Union was informed by the President of the company that he could not supply any information concerning the taking of

¹ Clause 6 of the agreement between M & M Restaurants, Inc., and the Union contained the following: "The Employer agrees not to suspend or discharge any employee without good and sufficient cause."

² Clause 24 of the agreement provided: "The parties agree that they will endeavor to adjust any dispute that may arise from the interpretation or application of this Agreement within a period of 48 hours. In the event that no accord can be reached, the matter in dispute shall be referred to a Board of Arbitration within two days from the date which the parties to the Agreement shall fail to reach an agreement in connection with the matter in dispute, and said Board of Arbitration shall be composed of one representative of the Employer and one representative of the Union, and one disinterested party chosen by the two said members of the Board of Arbitration. In the event the two parties shall fail to agree on a third disinterested party, the parties agree that the American Arbitration Association be requested to appoint a person to serve in the capacity of the third and impartial arbitrator."

Brawner's badge. Thereupon the dispute was referred to a board of arbitrators composed of John B. Cullen, Esquire, named by the company, Samuel H. Jaffee, Esquire, named by the Union, and the Honorable Nathan Cayton, named by the American Arbitration Association. These arbitrators, Mr. Jaffee dissenting, found: "The evidence before us does not establish that Rachel Brawner was ever discharged by the Company. There was no evidence from which it can be said that the Company ever indicated any desire or intention to terminate or dispense with her services." The arbitrators further pointed out: "The real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully, she contends) denied her physical access to the place of her employment."

In sum the facts are that Rachel Brawner, a short-order cook employed by the civilian concessionaire operator of a cafeteria located on the premises of the Naval Gun [fol. 167] Factory, was denied retention of the identification badge which had permitted her to enter the premises where she worked, the denial being by the authority of the naval officer in command of the Factory. The stated reason was that she failed to meet security requirements. She was not informed as to the factual premises for the conclusion. No charge was made against her.

After the foregoing events the Union and Mrs. Brawner filed a civil action in the District Court against the Secretary of Defense and other Government officials, in their individual and official capacities, and M & M Restaurants, Inc., for a declaratory judgment, injunctive relief, vacation of the arbitration award, and recovery of damages. The District Court granted summary judgment for the Government defendants and dismissed the complaint as to all defendants. This appeal followed.

I. The Problem Stated

The problem to be solved is a narrow one. It concerns the nature and extent of the power of a naval officer in command of a naval installation to control the ingress and egress of civilians to and from the premises. The discus-

sion on the briefs and in argument has gone far afield from this problem. The case does not involve debarment from a chosen occupation. It is not a discharge case. The case does not involve any Personnel Security Program, with its concomitant regulations.

II. Power to Control Access to Naval Gun Factory

Line of Authority.

We first examine the authority of the Navy to prescribe rules for the admission of civilians to Navy installations. The authority begins with the Constitution.

"The Congress shall have power to dispose of and make all needful . . . regulations respecting the territory, or other property belonging to the United States; . . ."

"The Congress shall have the power . . . ;

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, . . ."

"The Congress shall have the power . . . ;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces; . . ."

The line of authority then proceeds by statutes.

"The Secretary of the Navy has custody and charge of all . . . property of the Department."

³ Art. IV, § 3, cl. 2.

⁴ Art. I, § 8, cl. 17.

⁵ Art. I, § 8, cls. 13, 14.

⁶ 10 U.S.C. § 5031(c), which was 5 U.S.C. § 413, which was R.S. 418, derived from an Act of April 30, 1798, ch. 35, § 3, 1 Stat. 554.

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for . . . the custody, use, and preservation of . . . property appertaining to it."⁷

"United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President."⁸

[fol. 169] Next in this line of authority come certain United States Navy Regulations issued pursuant to Section 1547 of the Revised Statutes.⁹ They were issued by the Secretary of the Navy; the Honorable John L. Sullivan, and approved on that same day by the President, the Honorable Harry S. Truman. These Regulations contain the following provisions:

"The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations."¹⁰

"In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

.
 "3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command."¹¹

⁷ This section now appears as 5 U.S.C. § 22 (1958). It was R.S. 161, derived from a number of Acts, beginning with one of July 27, 1789, ch. 4, 1 STAT. 28. It was amended in respects not here material by Pub. L. No. 619, 85th Cong., 2d Sess. (Aug. 12, 1958), 72 STAT. 547.

⁸ 10 U.S.C. § 6011 (1958). This was 34 U.S.C. § 591, the source of which was R.S. 1547. In addition 10 U.S.C. § 121 (1958) provides: "The President may prescribe regulations to carry out his functions, powers, and duties under this title." This "title" of the United States Code was revised, codified and enacted into law by statute, being Pub. L. No. 1028, 84th Cong., 2d Sess., ch. 1041 (Aug. 10, 1956), 70A STAT. 1.

⁹ 34 U.S.C. § 591, codified Aug. 10, 1956, as 10 U.S.C. § 6011.

¹⁰ Regs. § 0701.

¹¹ *Id.* § 0734.

"The commanding officer shall require that orders and regulations pertaining to the security of . . . classified . . . material . . . are strictly observed."¹²

"Definitions.

"1. '*Classified matter*.'—Information or material in any form or of any nature which in the public interest must be safeguarded in the manner and to the extent required by its importance."¹³

[fol. 170] "Subject to law and as may be prescribed by the Secretary of the Navy, it shall be the duty of the Chief of Naval Operations to:

"12. Prepare and issue manuals and other appropriate publications containing orders, instructions, and procedures, conforming to these regulations, and pertaining to matters for which he is responsible."¹⁴

"The Chief of Naval Operations shall supplement these regulations with appropriate publications including the Security Manual, . . ."¹⁵

The United States Navy Security Manual for Classified Matter, promulgated October 2, 1954, contained the following:

"Persons who are considered visitors . . . are divided into four basic categories which are further subdivided as follows:

"*Category United States citizens* . . .
One

"Baker Personnel of private facilities under contract to the Department of Defense."¹⁶
(B)]

¹² *Id.* § 0713.

¹³ *Id.* § 1501.

¹⁴ *Id.* § 0204.

¹⁵ *Id.* § 1502.

¹⁶ Security Manual § 1403.

"The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted."¹⁷

The U. S. Navy Physical Security Manual promulgated by the Chief of Naval Operations on April 14, 1956, contained the following:

"Definitions

"1. *Naval Activity*. A naval activity shall be construed to mean a unit of the Naval Establishment, of [fol. 171] distinct identity, and established under an officer in command or in charge.

"3. *Facility*. A facility, for purposes of this instruction, is any building, shop or utility within an activity having a specific function."¹⁸

"*The Commanding Officer*. The Commanding Officer is responsible for the security of all property and installations within his command. He prescribes the security measures to be adopted, and coordinates when necessary, the measures adopted by subordinates, but he alone remains responsible for the overall security of his command."¹⁹

"*The Security Officer*. Normally, the Commanding Officer delegates most of the administrative and operational aspects of security to a subordinate, who is referred to in this manual as the Security Officer. The functions of this officer include planning, supervision, inspection, coordination, and submission of recommendations with respect to:

"a. Physical security

"(1) Internal security

¹⁷ *Id.* § 1409.

¹⁸ Physical Security Manual § 0100.

¹⁹ *Id.* § 0154.

²⁰ *Id.* § 0156.

"Specific duties. The planning, supervision and co-ordination of matters relating to the security of the command includes:

"a. Internal security matters:

*"(1) Safeguarding from . . . the unauthorized disclosure of classified matter."*²¹

It is argued by the Union that these Navy regulations and manuals were not published in the Federal Register pursuant to the requirements of Section 3 of the Administrative Procedure Act²² and the Federal Register Act²³ [fol. 172] and thus were not valid. The section of the Administrative Procedure Act providing for publication begins:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest . . . —

"(a) Every agency shall . . . publish in the Federal Register [etc.]"

Certainly the operation of an agency for the design, planning and production of naval guns and other ordnance is a function requiring secrecy in the public interest. The Attorney General's Manual on the Administrative Procedure Act cites as an illustration of the meaning of the provision: "Thus, the War Department obviously is not required to publish confidential matters of military organization and operation" Therefore, in so far as these regulations apply to the Naval Gun Factory, they need not be published in order to establish their validity. We are not concerned with their validity in any other application. Furthermore the provision of the Act to which we have referred excepts from publication "any matter relating solely to the internal management of an agency". In so far as these regulations prescribe the authority of the

²¹ *Id.* § 0156.3.

²² 60 STAT. 238 (1946), 5 U.S.C. § 1002 (1958).

²³ 49 STAT. 501 (1935), 44 U.S.C. § 305(a) (2) (1958).

commanding officer over an installation such as the Gun Factory, they relate to the internal management of the Navy. The public effect is remote. The Committee Reports on the Bill which became the Administrative Procedure Act point out that the publication provisions were intended to make available to the general public such administrative operations and procedures as are public property. The authority of naval officers over naval operations can hardly be classified as public property. In so far as the Federal Register Act is concerned, no act of Congress required [fol. 173] publication; the Navy regulations had not been designated by the President as applicable to the general public; and thus were not required by this statute to be published.

It therefore seems clear that naval officers in command of naval installations have ample authority to control the ingress and egress of civilians to and from the premises of the command.²⁴

The Exercise of Authority.

The contract made October 1, 1955, between the Board of Governors of the Naval Gun Factory Cafeterias and M & M Restaurants, Inc., provided in part:

" * * * In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who

"(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity."²⁵

²⁴ The Congress has recognized the existence of such authority by prescribing penalties for the unauthorized entrance upon such naval installations. See, *e.g.*, 62 STAT. 765 (1948), 18 U.S.C. § 1382 (1958); 64 STAT. 1005 (1950), 50 U.S.C. § 797 (1958).

²⁵ Sec. 5(b). The predecessor contract, of December 1, 1949, in effect when Brawner was employed, provided in Art. IX(b): "Approval for the employment of any person by the Concessionaire to work in the Naval Gun Factory * * * shall be conditioned

In answer to an interrogatory posed in this lawsuit by the plaintiffs to the defendants concerning the procedure followed by the officials of the Naval Gun Factory to de-[fol. 174] termine whether a civilian, non-Governmental employee should be given an identification badge, the Governmental defendants answered that each applicant for an identification badge was required to complete an application form which contained the following: "I agree to obey all Naval Gun Factory Regulations" The execution of such an undertaking by Brawner is implicit and not denied.

Not only do the Government officers have technical authority to protect the privacy of premises such as a naval gun factory, but the right to do so is a right of the highest priority in the public interest. No one, we think, would question that right or its priority. Certainly the realisms of the world situation dictate its necessity. On the other hand, no individual citizen has a natural or inherent right to enter such premises. And we find no statute which confers such a right upon civilians. The only right of entrance possessed by a civilian is a right gained by contract or by specific permission. Brawner's only right to enter the Gun Factory was a right which she gained by way of her contract of employment. It was derived from a combination of two contracts, one between the Government and her employer and the other between her employer and her. Brawner's only right of entrance was subject to the flat, unequivocal contract provision that employees permitted entrance to the Factory must meet the security requirements of the command. We do not see how a contract right of an employee of a contractor with respect to the subject matter of the contract can be superior to the rights of the contractor in respect to that subject matter. If the rights of a contractor-employer are subject to limitations, the rights of employees under the contract are

upon the right of the Superintendent, or his duly designated representative, to cancel, revoke or withdraw the same for any cause or reason deemed sufficient by the Superintendent, or his representative, in the exercise of discretion, without the necessity for any showing of cause."

subject to the same limitations.²⁶ Thus, for example, if [fol. 175] a contract specifies a 40-hour work-week, no individual employee has a right to demand employment for 60 hours a week. Moreover we know of no rule of law or custom which requires that employees be informed of the terms of the employer's contract, to which they are not parties but by virtue of which they gain their employment.

Thus it clearly appears that the commanding officer at the Factory had a high priority right to protect entrance to the Factory and the civilian Brawner had merely a right derived from a contract which specifically provided that she must meet the security requirements of the officer. This being the situation, we fail to perceive any limitation upon the discretion of the commanding officer in respect to civilian presence within his command, except limitations imposed by higher naval authority. We find no rights of the public, or of any member thereof, which act as a restriction upon the otherwise unfettered discretion of naval officers in such a matter.

The contract between M & M Restaurants, Inc., and the Government contained no provision relating to procedure upon the denial of access to the Factory by an employee, but the contract between Brawner (via her representative, the Union) and her employer did provide a procedure in respect to disputes under that contract. It provided for arbitration. As we have seen, she was afforded that full procedure. She has had the full of her contractual procedural rights.

III. Power to Control Access *versus* Claimed Right to Employment at Naval Gun Factory

It is argued in Brawner's behalf that her right to employment was involved in her right to be daily upon this particular site; that this right to employment was a protected right; and that this protection reached through to create a protected right to be at a particular site of employment. We think principles applicable to employment as such are not applicable to the case we have before us.

²⁶ 2 WILLISTON, CONTRACTS § 364A & n. 5 and cases there collected (3d ed. 1959); *id.* § 394.

[fol. 176] We discuss those principles only because they are pressed upon us and we think they reflect some erroneous premises which we are in duty bound to indicate.

Employment—a Qualified Right.

In the first place it is obvious that no one has an unqualified right—inherent, statutory or constitutional—to enter upon such employment as he chooses. Qualification, or suitability, is a restriction upon any such right. For example, maintenance of strict secrecy in respect to certain matters which come naturally to an employee's knowledge in the ordinary course of his employment is a commonplace element of suitability for particular employment. Trade secrets in industry,²⁷ financial matters in business, official affairs in Government,²⁸ are within the scope of this custom. Furthermore the Government frequently requires that one be particularly qualified, even for private employment: for example, to be a nurse, or a barber, or an engineer, or a lawyer. A young man, even one out of college, has no unrestricted right to practice law. He must (1) study for a prescribed period and (2) qualify under tests sponsored by the judicial branch of the Government. It is after one has been qualified and licensed, or admitted, to a trade or profession that rights under contract or statute attach and a debarment from that occupation requires certain procedural steps.²⁹ And the same doctrine applies [fol. 177] where Government action is of such nature as to be a factual debarment of the individual from his vocation or profession, even though not a formal disbarment or cancellation of license. This is what the Supreme Court was talking about in *Greene v. McElroy*,³⁰ as the Court

²⁷ See Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 667-674 (1960).

²⁸ To take a simple example: a law clerk applicant may be a legal giant; he may have a most engaging personality; but, if he cannot be entrusted with judicial secrets, no judge would consider him suitable for appointment. The same principle obviously applies in all branches of the Government.

²⁹ See GELLHORN & BYSE, *ADMINISTRATIVE LAW* 768-779 (1954).

³⁰ 360 U.S. 474 (1959).

repeatedly emphasized in its opinion. The person there involved was an aeronautical engineer of such specialized training and capacity that access to classified information was essential to engagement in his profession. Denial of such access was a complete debarment.

Removal Process.

No employed person has an inherent or natural right (i.e., a right apart from statute, regulation or contract) to any sort of process in respect to removal from his particular job.³¹ In private employment an employee's rights in respect to discharge stem from the contract of employment. This is and always has been established law; it is one of the basic reasons for trade unions. The rights of Government employees in respect to removal from employment stem from statute or from regulations adopted by the authority by which they were employed. This has been established law throughout the history of this country.³² Originally, as every student of history knows, the Executive authority had plenary power to remove summarily any and all Executive employees; and they did so.³³

³¹ 35 AM. JUR. *Master and Servant* §§ 26, 34 (1941) and cases there cited.

³² See, e.g., *Ex parte Duncan N. Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839); *Shurtleff v. United States*, 189 U.S. 311 (1903); *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

³³ The history texts are replete with examples. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 13-14, 20, 26, 28, 39, 65, 120-121, 125, 130, 147, 153, 155, 160, 164, 166, 168, 170, 252 (1905); 4 CHANNING, *HISTORY OF THE UNITED STATES* 256-257 (1935); 5 CHANNING, *op. cit. supra* at 389 (1933); 6 CHANNING, *op. cit. supra* at 302 (1930); SCHUBERT, *THE PRESIDENCY IN THE COURTS* ch. 2 (1957); HACKER & KENDRICK, *THE UNITED STATES SINCE 1865*, pp. 99-100 (1934); HICKS, *THE FEDERAL UNION* 397 (1937); HART, *TENURE OF OFFICE UNDER THE CONSTITUTION* (1930); and see generally SAGESER, *THE FIRST TWO DECADES OF THE PENDLETON ACT: A STUDY OF CIVIL SERVICE REFORM* (Univ. Studies, U. of Neb., 1935); FOULKE, *FIGHTING THE SPOILSMEN* (1919); Richardson, *Problems in the Removal of Federal Civil Servants*, 54 MICH. L. REV. 219 (1955); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 296 *et seq.* (1950).

The climax of the long fight for security in the civil service [fol. 178] was the enactment of the Lloyd-La Follette Act in 1912. That Act, as amended, is still in force. It specifically provides: "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay."³⁴

That statute has been discussed under attack many times in the courts, but no court has ever intimated a shadow of unconstitutionality in it. The law is clear. Absent an express statutory protection, any Government office, the tenure of which is not fixed by the Constitution or set by statute, is subject to removal at pleasure. This one thread is the warp of the whole fabric of the case law; it appears throughout—from *Ex parte Duncan N. Hennen* in 1839³⁵ to *Vitarelli v. Seaton* in 1959.³⁶ Except for special classes, Government employees may be removed summarily without charges and, except for the provisions of the Lloyd-La Follette Act, without reasons. A holding to the contrary would necessitate a ruling that the Lloyd-La Follette Act is and always has been invalid; that the hundreds of employees discharged under its procedural terms since 1912 were wrongfully discharged; and that Government employment at all levels carries life tenure, i.e., inherent, constitutionally protected invulnerability to discharge, except upon charges, open hearings, confrontation by witnesses, cross-examination, and findings. Such conclusions have no support in law, in our opinion.

Situs.

Finally, absent a special contract or circumstances constituting a total debarment from an occupation, an employee has virtually no rights in respect to the situs of his employment. Grocery chains, public utilities, law firms, and notably the Government, move employees about from

³⁴ 37 STAT. 555, as amended, 62 STAT. 355 (1948), 5 U.S.C. § 652 (a) (1958).

³⁵ 38 U.S. (13 Pet.) 230.

³⁶ 359 U.S. 535.

place to place willy-nilly. It would be fantastic to propose seriously that an employee of a large employer has some sort of procedural rights which must be respected before he can be moved from here to there. Certainly the Government's many moves in decentralization programs give no heed to any such notion.

The young lawyer in our analogy, *supra*, has no right to employment by any particular person or client, or indeed to any clients at all. And his place of employment, his continued engagement in any particular matter or by any particular client, are entirely at the whim of his employers. To take a simple example: If the Government were to retain as consultants a private law firm, and the firm sent one of its young lawyers to do some of the work; and if a Government officer called a senior member of the firm and said, "This young man is too gabby for our purposes. Don't send him over here any more"; the young lawyer would have no rights of procedural process of any kind, sort or description.

Again by way of analogy, certainly no one would doubt the authority of the Supreme Court to require its private [fol. 180] printer to transfer a Linotype operator who, without wrongful intent, portrayed to his friends at afternoon stops in a convenient bar the nature of the opinions he was putting in print. No one would contend, we think, that the right of a Linotype operator to work on the advance printing of opinions of the Court is such that he could not be removed from the premises without a hearing in full panoply of charges, confrontation of witnesses, compulsory disclosures in public by his cronies, cross-examination, and findings. An investigation sufficient to satisfy the Court of the afternoon garrulity of the employee and a quiet word to the printer would be all such a situation would entail, we think. He could be put to work somewhere else.

We come back to the problem as to Brawner. She was not discharged. She was not debarred from her chosen occupation. She was offered a similar job by her same employer, and she refused. There are scores of places open to short-order cooks here and everywhere. The essence of her claim is that the site of her employment

cannot be changed unless charges are made against her and she has a full hearing with witnesses, etc. We find no substance whatever to her claim.

Stigma.

It is further argued in Brawner's behalf that the Governmental action has besmirched her reputation. Of course it has consistently been held that outright dismissals from Government employ, on stated grounds of malfeasance, bribery, or even attempted seduction, are validly accomplished without the traditional trappings of due process.³⁷ And we see no comparatively greater defamation in a [fol.181] denial of entrance to a naval installation because of its security requirements. Nobody has said that Brawner is disloyal or is suspected of the slightest shadow of intentional wrongdoing. "Security requirements" at such an installation, like such requirements under many other circumstances, cover many matters other than loyalty. Certainly they must cover garrulity, honesty, a measure of judgment, sobriety, a high sense of one's obligations, etc. A naval installation such as a gun factory is in and of itself a confidential matter of highest priority, and many of its vital features are observable by anyone on the premises. Many physical characteristics of guns or machinery may be observable and transmittable by the most inexperienced observer. The mere presence of certain officers may be important. The normal idle lunchtime chatter of employees in such operations may be saturated with comment which may well be inconsequential upon the premises but pregnant with danger outside it. Security regulations for such places are not to be restricted to control of access to copies of papers or limited to the locking of a safe at night. Security regulations in such an installation may well include an impenetrable silence on Factory matters and events, no matter how trivial they may appear to a reviewing

³⁷ *Eberlein v. United States*, 257 U.S. 82 (1918); *Golding v. United States*, 78 Ct.Cl. 682, cert. denied, 292 U.S. 643 (1934); *Kent v. United States*, 105 Ct.Cl. 280 (1946); Richardson, *Problems in the Removal of Federal Civil Servants*, 54 MICH. L. REV. 219, 240 et seq. (1955).

court. Denial of employment at a Navy installation because of its security requirements is certainly no more of a stigma than is a discharge for almost any reason. Almost any discharge is a "stigma". But such discharges are not protected by any inherent right to confrontation, cross-examination, etc. The rhetoric in these arguments is greater than their substance.

Third-Party Interference.

We come now to another phase of Brawner's case. It is argued to us that in this case the Government (i.e., the Governmental appellees) stands in the position of a third-party tort-feasor; that is, it was guilty of interfering with [fol. 182] an employment contract.³⁸ That contract was Brawner's contract (via her representative, the Union) with her employer. In the first place we note this is not the typical case of third-party interference. Admittedly the Governmental action did constitute an "interference" with Brawner's continued employment at a particular situs. The precise question is whether this "interference" was illegal, that is, constituted an actionable wrong. As we have already seen, vis-a-vis his employer, no employee has an inherent right to work at a particular situs. Such a right may under some circumstances exist vis-a-vis a stranger to the employment relationship. But under the

³⁸ The cases stating the law pertinent to this tort are collected in Annots., 29 A.L.R. 532 (1924); 84 A.L.R. 43 (1933), *supplemented*, 26 A.L.R. 2d 1227 (1952); 9 A.L.R. 2d 228 (1950). The law in this area developed from early recognition of a right of action for intentional interference with a man's business, *Garret v. Taylor*, Cro. Jac. 567, 79 Eng. Rep. 485 (1621), to include protection of one's right to a livelihood, e.g., *Truax v. Raich*, 239 U.S. 33 (1915) (involving an employment relationship terminable at will by the parties); *Owen v. Williams*, 322 Mass. 356, 77 N.E.2d 318 (1948). We must note that the United States as such cannot be liable in damages for "interference with contract rights" (including employment contracts) under the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1958). See *Dupree v. United States*, 264 F.2d 140 (3d Cir.), *cert. denied*, 361 U.S. 823 (1959). In view of our disposition of the case, we need not reach the question whether the appellants are seeking to hold the United States, and not merely the Governmental appellees, liable for such damages.

law of third-party-interference a defendant is not liable if the alleged interference is no more than the exercise of a legal right equal to or greater than the right claimed by the employee.³⁹ The Government had such a right, [fol. 183] namely, the right to exclude people from the Gun Factory. Through the Board of Governors of the Gun Factory Cafeterias, the Government recited this right in Section 5(b) of its contract with M & M Restaurants, Inc. This right was exercised by the Government, through the Governmental appellees, by enforcement of the contract. This right is clearly equal to, or greater than, whatever right Brawner could claim to work at the particular situs. Furthermore, not only did the Governmental appellees exercise a legal right; they performed the legal duty of exercising their discretion under the applicable regulations. We find no liability on the Governmental appellees as third-party tort-feasors.

IV. Liability of M & M Restaurants, Inc.

We next consider the liability of the concessionaire. It is argued to us that the agreement between M & M Restaurants, Inc., and the Union, the latter acting on behalf of all employees, contained a provision that employees should not be discharged without good and sufficient cause. To this there are two answers. In the first place, Brawner was not discharged. In the second place, if she had been discharged, surely, so far as her employer was concerned, the refusal of the commanding officer of the Factory to approve her entrance upon the Factory premises was a good and sufficient cause for the employer to release her from employment.

³⁹ See *Spalding v. Vilas*, 161 U.S. 483 (1896) (Postmaster General held not liable in damages even if he acted maliciously); Annot., 29 A.L.R. 532, 533 (1924). In *Donovan v. T. & P. Ry.*, 64 Tex. 519 (1885), an employee of a freight hauling company lost his position because the railway, by regulation, barred all but railway employees from access to its warehouse. The railway was found not liable, because it had a legal right to adopt such a regulation.

V. *Greene v. McElroy*

Greene v. McElroy, *supra*, is cited to us as controlling. We think it does not treat of our problem. In the first place *Greene* dealt only with the "authorization" relied upon by the Government officers. The Court was quite [fol. 184] explicit about this delimitation. We do not have that line of authorization in our case, and the authority dealing with entrance upon naval installations, which we have recited, is clear and ample. In the next place, as we have pointed out, *Greene* dealt with a total debarment, in fact even though not technically, from a chosen occupation. The testimony was, as recited in footnote 11 to the Court's opinion: "In view of his [Greene's] position with the company, there was no work which he could do in light of this denial of clearance by the Navy. As a result, it was necessary for the company to discharge him." We have no such case here. In the concurring opinion in *Joint Anti-Fascist Refugee Committee v. McGrath*,⁴⁰ which the Court cites in *Greene*, Mr. Justice Frankfurter emphasizes the historic background of the procedural requirements in different types of proceedings. The Justice said in part:

"The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

• • • • •
 " . . . Finally, summary administrative procedure may be sanctioned by history or obvious necessity." ⁴¹

⁴⁰ 341 U.S. 123 (1951).

⁴¹ *Id.* at 163, 168.

We have discussed the historic background of our present problem, the precise nature of the interest affected, and the other factors mentioned in the quoted passage. Nothing [fol. 185] in that study suggests a hearing, with witnesses, etc., in respect to employment at a particular place, where the circumstances do not spell total debarment from an occupation.

We hold only that under the circumstances of this case—including the statutes, the regulations, the nature of the place involved, the two contracts, and the arbitration proceeding—no rights of appellant Brawner were violated by the lifting of her identification badge for entrance to the Gun Factory. We have discussed other subjects only because they were pressed upon us by way of argument and must needs be discussed.

The judgment of the District Court is

Affirmed.

DANAHER, *Circuit Judge*, concurring: The dissenting opinion seems to condemn a majority of the court for the decision to rehear the case *en banc*. I am impelled to comment for I had dissented from Judge Edgerton's opinion now annexed to Judge Fahy's present text, as is my original dissent.

It has been fittingly observed that our power to rehear a case *en banc* should be exercised "sparingly," particularly at the instance of one of the parties.¹ "Moderation and self-[fol. 186] restraint" control the exercise of our discretion in deciding such motions, but one criterion, at least, in

¹ It may prove of interest to observe that there have been 72 such motions in the current court year and only 2 have been granted. Our Clerk's records show as to motions for rehearing *en banc* filed by one of the parties: in the court year 1958-1959, 97 such motions were filed and we granted but 1; in the preceding court year, 84 such motions were filed and we granted but 2; in the court year 1956-1957, 48 such motions were filed but we granted none; in 1955-1956, 32 such motions were filed and we granted but 3; in 1954-1955, 35 such motions were filed and we granted none, while in the preceding year we granted but 1 of 21 motions. Thus, of 389 such motions in the last seven court years, only 9 have been granted.

volves the effect of an erroneous opinion which may set a precedent for this Circuit.

Our dissenting brothers observe that after appeal in this case had been taken, none of the parties and no member of the division assigned to hear the case and no other member of the court requested that the case be heard *en banc*. Overlooked is the fact that a unanimous division of this court had decided our *Greene v. McElroy* on April 17, 1958,² where the situation and the circumstances went far beyond those presented in the instant case. There was no slightest reason for any member of the court or for counsel for the parties to assume what course ultimately might be followed in the *Greene* case.

The Supreme Court granted *certiorari* in *Greene v. McElroy* on October 27, 1958.³ The instant case, before a division of the court differently constituted from that which had heard the *Greene* case, was argued February 19, 1959. The sitting division decided to await the action of the Supreme Court. Neither counsel nor any other member of the court then knew that we had done so, nor could any of us know that the Supreme Court on June 29, 1959 would hand down its decision reversing *Greene v. McElroy*.⁴

Not until August 21, 1959 during summer recess, with most of the judges away, could it publicly be known that a majority of the sitting division had concluded that the [fol. 187] instant case was deemed to be controlled by the Supreme Court's decision in *Greene v. McElroy*. When Government counsel saw the opinion of the majority, a motion for rehearing *en banc* was promptly filed.

After our judges had returned for the Fall sessions of the court and had had an opportunity to read the majority opinion with the opposing dissent, and to consider the Government's pending motion, the case was ordered on for argument before the full court on November 9, 1959.

What did the record disclose? A private corporation had had a contract with the United States Government to

² 103 U.S.App.D.C. 87, 254 F.2d 944.

³ 358 U.S. 872.

⁴ 360 U.S. 474. Argument was had on April 1, 1959.

operate a cafeteria in the Naval Gun Factory, owned by the United States. The contractor, M & M Restaurants, Inc., had as one of its employees, Rachel Brawner. As a cook, like other private, non-Government personnel, she was privileged to enter upon the premises of the United States Government only while in possession of a badge of identification, required by naval regulations.

The Board of Governors at the Naval Gun Factory had been notified by the Navy's security officer that Rachel Brawner "would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory *until clearance is certified by the Security Officer.*" (Emphasis added.) Mr. Baker, representing M & M, was requested to return Mrs. Brawner's badge, and he did so. Mr. Baker informed Mrs. Brawner that he had picked up her badge "for security reasons."⁵

The appellant union instituted arbitration proceedings, extensively conducted thereafter. It was then brought out that the union represents 2,000 members who are privately [fol. 188] employed by restaurants in Government buildings and 600 members who are commercially employed in cafeterias and restaurants in this area. One of the arbitrators, Samuel H. Jaffe, Esquire, of the firm of Jaffe and Dunau, dissented from the arbitration award. He argued in his dissent against the determination by those in command that Mrs. Brawner did not meet "basic requirements and thus her pass was revoked." He pointed out that there is "no greater threat to the very existence of a labor organization than to permit an employer the unilateral action it has indulged here." (Emphasis added.) He further assailed the action of the security officer as "in excess of his authority or under authority not validly conferred. For otherwise no government employee could ever have successfully challenged his ouster from public employment on security grounds: the government could simply

⁵ Mr. Baker's interpretation may not seem accurate. The notice indicated that Mrs. Brawner had become subject to further check. "Security" could mean many things. Mrs. Brawner might even have been personally insanitary in her food handling and had so become a risk. We have not been told just what prompted the further check on Mrs. Brawner.

answer his protest by saying that the government cannot be required to permit him to work in a building it owns and from which his entry could be barred."

As will be seen from the majority opinion of the sitting division, Judge Edgerton adopted the position urged by Mr. Jaffe. He found the naval officer's order invalid in terms of *Greene v. McElroy* as lacking safeguards of confrontation and cross-examination, and "if," he said, "if" Navy regulations purported to justify the order, the regulations "as in the *Greene* case" were likewise similarly deficient. He adopted the analogy offered by Mr. Jaffe that the Government might "deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work." Of course, we were not dealing here with a Government employee. Again, even Government employees in *unprotected* status may be dismissed out of hand. They have protected employment rights only if and when Congress confers such rights.

Thus, as our judges examined the record, it became apparent that there is much more to the problem than at first seems to meet the eye.

[fol.189] Mrs. Brawner's employer, M & M, offered her other employment at a different installation operated by it. She refused. That there are scores of privately operated concessions in Government buildings is common knowledge. It is reasonable to assume that private employment as a cook may be available in hundreds upon hundreds of restaurants and cafeterias in the Washington area. This is not a case of "barricading" Mrs. Brawner against employment, as the Supreme Court found had happened to *Greene*. But it is a case of the union insisting that it may place and keep one of its members in a *private* employment status in a *particular* job, in a *particular* place on *Government* property even when Government authorities direct that access be denied "until clearance is certified by the Security Officer."

Never to my knowledge had there been such a challenge to the Government's right to protect its own Navy installation. Throughout our history, the authority of a Navy commandant had not been questioned as he exer-

cised controls over those seeking or claiming the privilege of access to Government property in his charge. I dissented from the majority views. For one thing, I thought the Commandant independently possessed the power he asserted. Again, to the extent that a majority of the sitting division found that the Navy regulations, if relied upon, might have been invalid, I particularly sought to "dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for 'confrontation and cross-examination' of sources whose reports may have led to revocation of the privilege of access to the Government's enclave."

I believe a privately employed worker hired by a Government contractor may enter upon Government property only as a matter of privilege which may be accorded or withdrawn as those lawfully charged with responsibility for maintenance of the property may prescribe. I believe no hearing need necessarily be required. To illustrate, I [fol. 190] believe confrontation by accusers and a right of cross-examination are not essentials to a valid revocation of "passes" permitting lawyers to use the Supreme Court library, or passes to visitors to the White House, or to employees of public utilities and other contractors servicing Government buildings. It might seem that any of many indiscretions or, specifically a food-handler's personal habits, could prompt such revocation. Even though a privately employed person has no *authorized* access to a file room in a highly sensitive naval gun factory, if such a person without authorization should be observed in that file room, I think the security officer may order a suspension of the privilege of access pending clearance. I think that officer lawfully might demand that the employer transfer or otherwise deal with the employee without granting confrontation by accusers or a right to cross-examination of them. Even if it were a Government employee in an unprotected status no hearing of any kind whatever would be required.*

* See *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Bailey v. Richardson*, 86 U.S.App.D.C. 248, 182 F.2d 46 (1950), *aff'd* 341 U.S. 918 (1951).

Since the Government had had no opportunity to present its arguments in the light of Judge Edgerton's application of *Greene v. McElroy*, a majority of the whole court decided to hear this case *en banc*. We have no means of knowing whether the Supreme Court will take a case or not. We do know that, unless reversed, a majority opinion here establishes a precedent for this Circuit. If the views of the two judges were to bind the other seven judges comprising this court here at the seat of government, we would indeed be laying down a new rule of law to control the Government's administration of its property. [fol. 191] So we voted to rehear the case *en banc* and to consider the Government's arguments. Some of the factors distinguishing this case from *Greene* may be summarized:

Here, unlike *Greene*, there was no showing that the cook could not get another position. On the contrary, her own employer offered her another job which she declined.

Here, unlike *Greene*, it was the Government's own weapons producing property which was involved.

Here, unlike *Greene* where neither Congress nor Executive Order had authorized the particular procedure applied in *Greene*, we have the Constitution and the statutes expressly providing for control of military and naval establishments by officers selected for that responsibility. Indeed, Congress has made it a criminal offense for an unauthorized person to trespass upon the property.

Here, unlike *Greene* where an Industrial Security Clearance Program was challenged, we find a mere suspension of privilege of access "until clearance is certified"—and no regulation purported to authorize or to provide a right to a hearing.

Here, unlike *Greene* where a specially trained aeronautical engineer was typical of thousands who would potentially be deprived of private employment and "barricaded" against other work, we must balance the Government's

⁷ We, *ourselves*, refused to permit members of a bar association to conduct evening moot court sessions in this court house, essentially on grounds of building security. If the privilege had in fact been granted, would we have been precluded from revoking it without a hearing? and charges? and accusers? and confrontation and cross examination?

concern in its own protection in terms of excluding possibly undesirable employees of private contractors who may be employable elsewhere.

Finally, a majority of our judges may well have concluded that a majority of the sitting division had read into *Greene* what the Supreme Court said it had read out of it. Rehearing *en banc* was ordered because we believed [fol. 192] Judge Edgerton's opinion *might* be erroneous. We all heard and considered the case and now decide that it was erroneous. Judge Fahy would have us reinstate an opinion which most of us believe to be erroneous. I am unable to subscribe to the view that to perpetuate error makes for sound judicial administration.

As I see it, the Supreme Court, the Judicial Conference of the United States and Congress support the position taken by a majority of the court. I think there is great "call for this court *en banc* to overrule the [erroneous] decision of the division" which first heard the case. I quite understand that there had been differing approaches in a circumstance such as this, but I think the problem has been solved, not only by 28 U.S.C. § 46(c) but by the *Western Pacific Railroad Case*.⁸

Before the *Western Pacific Railroad Case* was decided, the late Chief Judge Stephens delivered a paper before the District Bar Association, pointing to our practice of fur-

⁸ 345 U.S. 247 (1953); views suggesting those held by Judge Fahy may be noted at page 265. The Supreme Court already had stated otherwise in *Textile Mills Corp. v. Comm'r.*, 314 U.S. 326 (1941). At page 335 Mr. Justice Douglas wrote:

"Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. Those considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc*. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

And see *Civil Aero. Bd. v. Am. Air Transp.*, 344 U.S. 4, 5 (1952) where the Court told this circuit it "may now wish to hear this case *en banc* to resolve the deadlock indicated in the certificate and give full review to the entire case."

nishing the draft opinion of a sitting division to the other [fol. 193] members of the court. He listed cases⁹ where the court had sat *en banc* after Congress had adopted 28 U.S.C. § 46(c), tracing recognition of its power to do so back to *Textile Mills Corp. v. Comm'r*, *supra* note 8.¹⁰

In the Conference of Senior Circuit Judges meeting on October 1, 1938, with Chief Justice Hughes presiding, Judge Stone of the Eighth Circuit brought up the question "of determining how many judges will sit in a given case." The Chief Justice asked: "... would it meet your point if the statute provided that the court shall consist of three judges unless in the opinion of the majority of circuit judges a larger court or a court of a greater number of judges at any time shall be deemed desirable?"¹¹ Following discussion, Judge Wilbur moved and the Conference adopted in substance, the proposal that Congress [fol. 194] be asked to legislate that a majority of the circuit judges might provide for a court of more than three judges when in their opinion unusual circumstances make

⁹20 Journal D.C. B.A. 103, 107, 108 (1953); at that time, 1953-1954, the Chief Judge made up the sitting divisions, assigning judges whose recognized differing viewpoints might be balanced in the consideration of each case. But since this court thereafter inaugurated the plan of choosing judges by lot, combinations of two particular judges holding similar "policy" views may occur with greater or less frequency, depending upon the dates they select for their assignments. Situations have arisen where a majority of the court has found itself at odds with particular opinions in cases as to which *sua sponte*, the full court has sometimes ordered rehearings *en banc*. See footnote 10.

¹⁰ The following tabulation, relevant to footnote 9, discloses that the court has *sua sponte* ordered rehearings *en banc* as follows:

	Motions	Granted
1953-1954	1	1
1954-1955	9	5
1955-1956	4	4
1956-1957	8	8
1957-1958	13	8
1958-1959	4	4
1959-1960	7	1

¹¹ Minutes of the Conference, p. 360.

such action advisable. The Conference so recommended, in 1938 and each successive year, until in 1941; the House adopted H.R. 3390. Its report No. 1246¹² drew upon a letter from Judge Biggs dated February 14, 1941, reporting the recommendation of the Judicial Conference that Congress act favorably on the measure. Judge Biggs noted that the Conference deemed it advisable that all the active and available judges of the circuit should be included "to avoid any ground for suspicion that particular judges of the court, more than three but less than all, were selected to bring about a particular decision."¹³ He added: "It was to avoid the determination of decisions by a minority of judges, although in the utmost good faith, that did not represent the judgment of the court as a whole, that the measure was recommended by the Judicial Conference"

The Senate in 1941 had before it S. 1053, the counterpart of the House measure. The Judicial Conference in special session in January, 1941, had recommended its passage. Administrator Chandler at the April hearings presented the favorable views of the Judicial Conference, quoting, in part, from a letter reflecting the Conference position:

"Many cases are of a highly controversial nature and permit, not unreasonably, diverse views of the [fol. 195] law. We think that if there be a controversial case a majority of the court should not be bound by a decision of two members, particularly if the other members of the court are plainly of the opinion that the question is of such importance that they desire

¹² See footnote 14, *Textile Mills Corp. v. Comm'r.*, 314 U.S. at 334-35. The Committee report deemed *en banc* consideration desirable. "It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges (there having been a dissent) sets the precedent for the remaining judges."

¹³ Letter on file, Administrative Office of United States Courts. Congress by the Act of August 3, 1949, 63 STAT. 493, added three judges to this court. Three of our Circuit Judges received recess appointments on October 21, 1949.

to have their say in regard to what they think the law is."¹⁴

Such was the background as reported by the senior circuit judges themselves for the ultimate adoption of 28 U.S.C. § 46(c). Congress cautiously examined the problem for many years in the light of Judicial Conference recommendations and Supreme Court pronouncements before codifying section 46(c).¹⁵

[fol. 196]. Of course we may—and most often do—decide not to resort to section 46(c). We may even refuse to do so altogether. We may then attempt to certify unresolved questions to the Supreme Court, but we may find them dismissed.¹⁶ We may let successive divisions develop a conflict within the circuit. Is that result to be desired? I

¹⁴ *Hearings Before the Subcommittee of the Senate Committee on the Judiciary*, 77th Cong., 1st Sess., re S. 1053, pp. 15-16 (1941). Additional legislative history may be found in *Western Pacific Railroad Case*, *supra* note 8, particularly at 254, and footnotes 8 *et seq.* and see *En Banc Proceedings in the United (sic) Courts of Appeals*, 22 GEO. WASH. L. REV. 482 (1954).

¹⁵ *Western Pacific Railroad Case*, *supra* note 8, at 253, 254; and see *Hearing and Rehearing Cases In Banc*, 14 F.R.D. 91, 96-97 where Judge Maris wrote:

"A decision of a controversial question made by a majority of all the judges of the court in banc obviously has much greater authority than a decision by two concurring judges of a panel of three which all the other five judges of the court might consider quite erroneous. True such matters could be corrected by the Supreme Court on certiorari but that court should not have to resolve conflicts of decision within a single court. The procedure in banc enables the court itself to deal authoritatively with problems of this nature, thus relieving the burden of the Supreme Court. The Circuit Judges of the Third Circuit think that this procedure has been very helpful in maintaining the very high esprit de corps which they enjoy. For each of them knows that in any case in which they are seriously divided in opinion they will all have an opportunity to participate in the ultimate decision which the court is to make and which under the doctrine of stare decisis is to be binding upon them in future cases."

¹⁶ See, e.g., *In re Burwell*, 350 U.S. 521 (1956), where the Court at 522 hinted at its *Western Pacific* case, as pointing a route to decision; and *Civil Aero. Bd. v. Am. Air Transp.*, *supra* note 8.

reject any such course, and believe we should earnestly attempt to decide and thus to settle our own differences—by majority action of the whole court. And that is precisely what the Supreme Court has told us to do.

“[A]ll but two Circuits have more than three Circuit Judges. This undoubtedly raises problems when one panel has doubts about a previous decision by another panel of the same court. . . . It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”¹⁷

Rehearings *en banc* pursuant to section 46(c) in most cases have achieved definitive disposition of controversial and decisive differences. I do not regard as wasted the time so spent, particularly when we look back upon the multiple conferences and the often futile exchanges of memoranda as we *otherwise* have sought agreement. Reconciliation of deeply held views has sometimes presented an imponderable problem in courts other than ours. A determination here by *en banc* rehearing and decision seems to me a highly salutary course. In that spirit we approached this very case.

The dissenters here would “reinstate” the opinion of the sitting division. A majority of the whole court, all [fol. 197] nine judges voting, deem it erroneous. We thus assert and exert the authority conferred by 28 U.S.C. § 46(c) precisely in furtherance of one of the important purposes of the legislation as recommended by the Judicial Conference and as recognized by Congress.¹⁸ We have acted under “a grant of power to order hearings and rehearings

¹⁷ Wisniewski v. United States, 353 U.S. 901-02 (1957), and cases cited. And see, *e.g.*, Starr v. United States, 105 U.S.App.D.C. 91, 264 F.2d 377 (1958), *cert. denied*, 359 U.S. 936 (1959); Brown v. United States, 105 U.S.App.D.C. 77, 264 F.2d 363, *cert. denied*, 360 U.S. 911 (1959).

¹⁸ It is reasonable to suppose the Supreme Court will agree. It has told us “Our [its] general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute or permitting departure from it” United States v. Nat. City Lines, 334 U.S. 573, 589 (1948).

en banc and to establish the procedure governing the exercise of that power,"¹⁹ as the Supreme Court recognized.

In that view condemnation of the present majority by two of our colleagues may seem inapropos. I concur in the opinion by Chief Judge Prettyman.

I am authorized to state that Chief Judge Prettyman and Circuit Judges Wilbur K. Miller, Bastian and Burger concur in my opinion.

FAHY, *Circuit Judge*, with whom EDGERTON, *Circuit Judge*, joins, *dissenting*: In my opinion, while according due respect to those of a contrary view, rehearing this case *en banc*, a matter for the exercise of the sound discretion of the full membership of the court, should not have been granted after the decision of the division. The statutory structure of this court of nine members, any three of whom constitute a court, is designed to enable us to keep abreast of our work as it increases in volume over the years. Though I do not question our power to [fol.198] rehear any case *en banc* it is a power to be exercised sparingly and only for good cause.¹

Appellant Rachel M. Brawner, the private individual concerned, and the appellant labor organization of which she was a member, brought an action in the District Court on September 6, 1957, claiming that she had been illegally deprived by the Government, on security grounds, of her private employment as a cook in a cafeteria which was located with Government approval in the Naval Gun Factory. The District Court decided against her on July 21, 1958. She and the Union appealed to this court on August 14, 1958. Neither the appellants, nor the United States; nor any member of the division of this court assigned to hear the case, nor any other member of this court, requested that the case be heard *en banc*. The division ac-

¹⁹ Western Pacific Railroad Case, *supra* note 8, 345 U.S. at 267.

¹ The late Chief Judge Stephens stated his views upon the subject some years ago for the information of the Bar. 20 D. C. Bar Ass'n Jour. 105-09 (1953).

cordingly heard argument, and took the case under advisement, in February 1959. There was then pending in the Supreme Court *Greene v. McElroy*, 360 U.S. 474. That case also involved the discharge, demanded by the Government on security grounds, of a person in private employment. Mr. Greene was an employee in a company manufacturing products for the Defense Department. He was authorized to have access to classified information, which our appellant was not. The division which heard the present appeal awaited the decision of the Supreme Court in *Greene v. McElroy*, which came down June 29, 1959. Reversing this court, the Supreme Court held that Mr. Greene's deprivation of employment was unauthorized.

Neither the United States, nor appellants, nor any of the nine members of this court, then sought reargument of appellants' case, en banc or otherwise. On August 21, 1959, the division which had heard this case decided it, [fol. 199] holding, especially in light of *Greene v. McElroy*, that appellant Brawner's discharge had not been validly accomplished, one judge dissenting. Five weeks later, on September 25, 1959, rehearing en banc was sought for the first time, by the United States, in order to obtain a reversal of our decision, thus using the full court of nine judges as a court of appeals over a division.

When the division decided the case it became ripe for consideration by the Supreme Court. When the United States nevertheless requested a rehearing en banc, each of the nine members of this court was called upon to consider the appropriate course for the litigation to take. Five members voted at this late stage to rehear the case en banc. It was accordingly set down for reargument, and reargued. It has now been re-decided, the earlier two to one decision of the division being reversed by a vote of five to four. Many months and much judicial and professional labor have been consumed in the en banc process, with final termination of the litigation still uncertain and probably far removed. A decision is rendered which four of us think clearly inconsistent with principles laid down by the Supreme Court in recently reversing this court in *Greene v. McElroy*. Appellant

Browner--unless she has wearied of the matter--will no doubt seek Supreme Court review. In that event the Supreme Court will be faced, as it could quite as well have been faced many months ago when the decision of the division was rendered, with the question whether or not to review the case. There was no call for this court en banc to review the decision of the division because, by reason of the nature of our court and of this case, the responsibility of decision at the level of this court had been fully met. It seems to me that in such a case as this the possibility of a different result should then have been left, as it is now much later left, to the Supreme Court. Even if the decision of the division be doubtful nothing has been advanced, and everything has [fol. 200] been retarded, for both the individual and the Government, by the substitution nearly eight months later of a decision no less doubtful.

Were the case of only local importance, and therefore one in which a decision deemed by a majority of the full court to be erroneous must be corrected if at all by the court en banc, because not worthy of presentation to the Supreme Court, then our court en banc might perhaps have been more warranted in intervening. *Larkin v. United States*, — U.S. App. D.C. —, — F.2d —, is illustrative. But even in such a case moderation and self-restraint would be in order, for the philosophy underlying the structure of this appellate court does not contemplate ordinarily a superior appellate court within the court itself. Moreover, had request for en banc hearing of this case been made before the division heard it, or even before the division decided it, such a hearing might reasonably have been granted because of the obvious importance of the case. But en banc intervention after the decision of the division has served merely to retard ultimate disposition of the litigation, with no countervailing advantage to either the public or the private interests involved.

My views thus expressed are not in condemnation of my brethren of the majority, but only an expression of opinion, different from theirs, as to the use of the en banc power.

I would vacate the order granting the rehearing en banc and would reinstate the opinion and judgment of this court first filed.

I add that deprivation of employment on security grounds is a grave injury. The public draws no sharp distinction between security and loyalty. *Cf. Vitarelli v. Seaton*, 359 U.S. 535. As the Supreme Court has said of exclusion from public employment on disloyalty grounds, "In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy." [fol. 201] *Wieman v. Updegraff*, 344 U.S. 183, 191. Engineer and cook alike suffer, in spirit and in reputation. They should have equal protection.

The opinion of this court first filed, and the dissenting opinion filed at the same time, were as follows:

Before EDGERTON, FAHY, and DANAHER, *Circuit Judges*.

EDGERTON, *Circuit Judge*: A private corporation, M & M Restaurants, Inc., under a contract with government officers, operated a cafeteria in the Naval Gun Factory, property of the United States. The corporation employed appellant Brawner, a civilian, as a cook. Without a hearing of any sort, the Superintendent and the Security Officer of the Naval Gun Factory excluded her from the premises and thereby deprived her of her job. They said she did not meet the "security requirements". No one told either her or the corporation which employed her what the security requirements were, or why she was believed not to meet them. The employer asked for "a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner." The request was refused.

Brawner and her labor union sued the Secretary of Defense, the Secretary of the Navy, the Superintendent and the Security Officer of the Gun Factory, and also Brawner's employer, for the loss of her job, and have appealed from a summary judgment dismissing the complaint.

Except with respect to the employer, the District Court erred. This has now become clear. On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds, "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene v. McElroy*, 360 U.S. 474. What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* [fol. 202] case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

It is immaterial that Greene's working place does not appear to have been, as Brawner's was, on government property. From the premise that "the United States could validly exclude all persons from access to the Naval Gun Factory", appellees draw the conclusion that the Secretary of Defense could validly exclude Brawner from her work there, on "security" grounds, without giving her a hearing. If the conclusion followed from the premise, it would likewise follow that the Secretary could deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work. But neither Congress nor the President has authorized any such thing. And it is clear that government officials may not deprive government employees of their jobs on security grounds except as authorized by Congress or the President. *Peters v. Hobby*, 349 U.S. 331; *Cole v. Young*, 351 U.S. 536.

The government challenges the standing of appellant labor union to sue. We think the union here had standing to protect the interests of its members.¹

¹ The union was the recognized representative of the employees of M & M Restaurants, Inc., under a collective bargaining agreement between the union and the Restaurants. The agreement

Cf. Nat'l Ass'n for the Advancement of Colored People v. Alabama, 357 U.S. 449, 459-460; *MacArthur Liquors, Inc. v. Palisades Citizens Ass'n*, 105 U.S. App. D.C. 180, 265 F. 2d 372.

Since Brawner's employer could not employ her within the Naval Gun Factory, the only place where [fol. 203] it had contracted to employ her, when the government appellees would not let her enter the place, it is not responsible for ceasing to employ her. Appellants' claim against the employer is for alleged breach of contract, and impossibility of performance defeats the claim. The judgment in favor of M & M Restaurants, Inc., is therefore affirmed. The judgment in favor of the government appellees is reversed and the case is remanded to the District Court for proceedings consistent herewith.

So ordered.

DANAHER, *Circuit Judge*: I concur specifically in the majority's opinion affirming the judgment in favor of M & M Restaurants, Inc. Otherwise I dissent.

To say that some officials may have abused their authority is not to deny that authority exists. This is not such a situation as was presented in *Greene v. McElroy*, 360 U.S. 474. The property here is owned by the Government and is part of the naval establishment. Control of access to the Naval Gun Factory has legally been vested in the Superintendent. When the public may enter and for what purposes and under what circumstances may be determined by that officer, in accordance with governing regulations. Congress has even made it a criminal offense, under

authorized the union to participate in any dispute arising thereunder, including a dispute over discharge of any employee. When Implant Foods, Inc., replaced the Restaurants as the operator of the cafeteria, the new collective bargaining contract included a provision whereby Implant agreed to reinstate appellant with full rights should this suit be determined in her favor. *Cf. Fishgold v. Sullivan Corp.*, 328 U.S. 275, 283.

some circumstances, for unauthorized personnel to be upon the premises. 18 U.S.C. § 1382 (1952).

The basic principle of control by the Government of its own naval establishment is here paramount, I think. Truck drivers, plumbers, telephone operators, electricians, artisans in every walk of life, in one way or other and at one time or other may have legitimate business with a naval base, but the privilege of access is to be extended and may be continued only as those charged with maintaining the security of the Government's operation may by regulation prescribe. If some petty thief or numbers player or narcotics peddler or otherwise unfit person should insist upon continuance of a previously extended [fol. 204] privilege of access, I think the regulations authorize the Superintendent to bar him.

I am unable to conclude that regulations under which the officials here acted were invalid or unauthorized. Particularly do I dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for "confrontation and cross-examination" of sources whose reports may have led to revocation of the privilege of access to the Government's enclave.

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BAZELON and WASHINGTON, *Circuit Judges, dissenting*:
We agree with Judges Edgerton and Fahy that the case must be reversed on the authority of *Greene v. McElroy*. We note also that we joined them in voting against rehearing en banc.

[fol. 205]

[File endorsement omitted].

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

Civil 2246-57

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Appellants,

v.

NEIL H. McELROY, Individually and as Secretary of
Defense, et al., Appellees.

Appeal from the United States District Court for the
District of Columbia.

Before: Prettyman, Chief Judge, and Edgerton, Wilbur
K. Miller, Bazelon, Fahy, Washington, Danaher, Bastian
and Burger, Circuit Judges, sitting en banc.

JUDGMENT—April 14, 1960

This cause came on to be reheard en banc on the record
on appeal from the United States District Court for the
District of Columbia, and was reargued by counsel.

On Consideration Whereof It is ordered and adjudged by
this Court that the judgment of the District Court appealed
from in this cause be, and it is hereby, affirmed.

Per Chief Judge Prettyman.

Dated: April 14, 1960.

Separate concurring opinion by Circuit Judge Danaher.

Separate dissenting opinion by Circuit Judge Fahy, with
whom Circuit Judge Edgerton joins.

Separate dissenting opinion by Circuit Judges Bazelon and
Washington.

[fol. 206] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER WITHDRAWING OPINION OF AUGUST 21, 1959—
April 18, 1960

It is Ordered by the court that the opinions (majority, opinion by Circuit Judge Edgerton, concurring opinion by Circuit Judge Fahy and the opinion of Circuit Judge Danaher concurring in part and dissenting in part) filed August 21, 1959, in the above-entitled case, are hereby withdrawn and shall not be published in the Reports.

Per Curiam.

Dated: April 18, 1960

[fol. 207] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER CORRECTING JUDGE DANAHER'S OPINION—
April 21, 1960

It is Ordered that after the word "inapropos" at the end of my separate concurring opinion (p. 35 of the printed text) filed herein April 14, 1960, the following new sentence be added:

"I concur in the opinion by Chief Judge Prettyman."

Dated: April 21, 1960

John A. Danaher, Circuit Judge.

[fol. 208] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

ORDER FURTHER CORRECTING JUDGE DANAHER'S OPINION
—April 25, 1960

It is hereby Ordered that the following new paragraph be added at the end of my concurring opinion filed April 14, 1960, in the above case:

I am authorized to state that Chief Judge Prettyman and Circuit Judges Wilbur K. Miller, Bastian and Burger concur in my opinion.

John A. Danaher, Circuit Judge.

Dated: April 25, 1960

[fol. 209] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Title omitted]

MOTION TO SUBSTITUTE APPELLEE THOMAS S. GATES AS THE
PARTY APPELLEE IN THE OFFICE OF SECRETARY OF DEFENSE
—Filed April 27, 1960

Pursuant to Rule 28(b) of the rules of this Court and Rule 25(d) of the Federal Rules of Civil Procedure, appellants move to substitute Appellee Thomas S. Gates as the party appellee in the office of Secretary of Defense.

1. The action in this case was commenced, *inter alia*, against defendant Thomas S. Gates, individually and as Secretary of the Navy, and against Neil H. McElroy, in-

dividually and as Secretary of Defense. On December 1, 1959, Neil H. McElroy resigned as Secretary of Defense, and on December 2, 1959, Thomas S. Gates was appointed as Secretary of Defense. As successor in the office of Secretary of Defense, appellee Thomas S. Gates adopts and continues the action of his predecessor. For the purpose of prosecuting a petition for a writ of certiorari there is substantial need for continuing and maintaining the action against appellee Thomas S. Gates individually and as Secretary of Defense. Accordingly, appellee Thomas S. Gates should be substituted as the party appellee in the office of Secretary of Defense, so that the action may proceed against him individually and as Secretary of Defense.

2. Appellee Thomas S. Gates appears to acquiesce in this substitution. In appellees' answer to the motion to supplement record, they state, "Appellees do not object to an order amending the title of this action to describe appellee Gates as now Secretary of Defense."

[fol. 210] 3. It is the position of appellants that the substitution of appellee Thomas S. Gates as the party appellee in the office of the Secretary of Defense does not abate the action against appellee Neil H. McElroy in his individual capacity for the purpose of recovering money damages against him for the harm caused by the alleged wrong.

Wherefore, this motion should be granted.

Bernard Dunau, 912 Dupont Circle Building, N.W.,
Washington 6, D.C., Attorney for Appellants.

Certificate of Service (omitted in printing).

[fol. 211]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Appellants,

v.

NEIL H. McELROY, individually, and as Secretary of
Defense, et al., Appellees.

Before: Prettyman, Chief Judge, in Chambers.

ORDER GRANTING MOTION TO SUBSTITUTE—May 18, 1960

Upon consideration of appellants' motion to substitute Thomas S. Gates, Secretary of Defense, as a party appellee Secretary of Defense in place of Neil H. McElroy, as Secretary of Defense, and it appearing that no objections have been filed, it is

Ordered that Thomas S. Gates, Secretary of Defense, is substituted as an appellee in his office of Secretary of Defense in the place and stead of Neil H. McElroy as Secretary of Defense.

Dated: May 18, 1960

[fol. 214] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 215] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 14,689

[Title omitted]

MOTION TO DISMISS THE APPEAL AS TO NEIL H. McELROY,
AS AN INDIVIDUAL—Filed May 3, 1960

1. Now come the governmental appellees and noting that the Court on April 25, 1960, entered an order denying appellants' motion to supplement the record wherein it was requested that this action continue against Neil H. McElroy individually and noting that appellant on April 26, 1960, filed a motion with the Clerk of this Court for the substitution of Thomas S. Gates for Neil H. McElroy in the office of Secretary of Defense, the appellees move to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity:

2. No allegation has been made upon which individual liability might be predicated.

3. It is abundantly clear that appellee's only relationship to the case was the responsibility imposed by law upon the office of the Secretary of Defense for the action of his subordinates in the course of their official duties.

[fol. 216] 4. Appellees' brief, beginning at page 36, discusses in detail the applicable law. It is quoted in part, for the convenience of the Court:

It is well settled that public officers when acting within the scope of their official authority are immune from suit for civil damages from a person claiming injury to their rights, *Spalding v. Vilas*, 161 U.S. 483, 498; *Gregoire v. Biddle*, 177 F. 2d 579, 581 (C.A. 2), certiorari denied 339 U.S. 949; *Cooper v. O'Connor*, 69 U.S.

App. D.C. 100, 103, 99 F. 2d 135, 138, certiorari denied 305 U.S. 643; *Laughlin v. Rosenman*, 82 U. S. App. D.C. 164, 163 F. 2d 838. As this Court said in the leading case of *Cooper v. O'Connor*, *supra*, 99 F. 2d at 138:

"[i]f the Act complained of was done within the scope of the officers duties as defined by law, the policy of the law is that he shall not be subjected to the harassment of civil litigation or be liable for civil damages because of a mistake of fact occurring in the exercise of his judgment or discretion, or because of an erroneous construction and application of the law."

Wherefore, it is respectfully submitted that this motion should be granted.

J. Walter Yeagley, Assistant Attorney General; DeWitt White, George B. Searls, Attorneys, Department of Justice, Washington 25, D. C., Attorneys for Appellees.

[fol. 217] Certificate of Service (omitted in printing).

[fol. 218]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Appellants,

v.

THOMAS S. GATES, individually, and as Secretary of
Defense, et al., Appellees.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K.
Miller, Bazelon, Fahy, Washington, Danaher, Bastian and
Burger, Circuit Judges, in Chambers.

ORDER GRANTING THE MOTION TO DISMISS AS TO
NEIL H. McELROY—June 2, 1960

Upon consideration of appellees' motion to dismiss this
appeal as to Neil H. McElroy individually, it is

Ordered by the court that insofar as this appeal relates
to Neil H. McElroy as an individual the appeal is dismissed.

Per Curiam.

Dated: June 2, 1960

[fol. 219]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 14,689

[Title omitted]

APPELLEES' MOTION TO RECONSIDER AND REAFFIRM THE COURT'S ORDER OF JUNE 2, 1960 GRANTING APPELLEES' MOTION TO DISMISS AS TO NEIL H. McELROY, IN HIS INDIVIDUAL CAPACITY—Filed June 7, 1960

1. On February 1, 1960 the appellants filed a "Motion to Supplement the Record" and on February 8, 1960 they filed a reply to appellees' answer to that motion. In these pleadings appellants set forth their desire that this action continue against Neil H. McElroy in his individual capacity. This motion was denied by the Court by an order entered April 25, 1960.

2. Appellants moved on April 26, 1960 for the substitution of Thomas S. Gates, in his capacity as Secretary of Defense, in the place and stead of Neil H. McElroy, who had been Secretary of Defense at the time of the commencement of this action. Without objection from the appellees the court granted this motion by order dated May 18, 1960.

[fol. 220] 3. The appellees, on May 3, 1960, moved to dismiss the appeal as to Neil H. McElroy as an individual which motion was granted by the court by order dated June 2, 1960. On June 3, 1960, Mr. Bernard Dunau, counsel for appellants, telephonically advised that he had just received a copy of the court's order of June 2, 1960, but that he had not received a copy of the appellees' motion, and that had he received the motion he would have filed an opposition thereto. We immediately made a check in an effort to verify the question of service. It appears, as best we can ascertain, that a letter of transmittal of the motion to Mr. Dunau was prepared. However, our Division

mailroom which should have a record of the letter if it was sent in the normal course, contains no such record of the transmittal letter to Mr. Dunau having been sent. In view of that and the fact that Mr. Dunau did not receive a copy of the motion, we regret that we must conclude that a letter transmitting the motion was not, in fact, sent due to some administrative inadvertency. A copy of our motion of May 3, 1960 is being forwarded to Mr. Dunau today along with a copy of this motion.

4. Since proper service was not made due to our apparent mistake, the appellees respectfully hereby move the court to afford the appellants a reasonable opportunity to file such answer to our previous motion as may be appropriate. Appellees also move that the court then, upon receipt of appellants' answer, reconsider the order of June 2, 1960. Since we understand from Mr. Dunau as a result of our telephone conversation on Friday that the [fol. 221] position of the appellants with respect to our motion of May 3, 1960 to dismiss the appeal as to Mr. McElroy individually will be substantially identical to the position they have previously expressed in this case in connection with the issue involved, it is our position that the court's order of June 2, 1960 should be reaffirmed.

Respectfully submitted,

J. Walter Yeagley, Assistant Attorney General;
DeWitt White, George B. Searls, Attorneys, De-
partment of Justice, Attorneys for Appellees.

[fol. 222] Certificate of Service (omitted in printing).

[fol. 223]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 14,689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Appellants,

v.

NEIL H. McELROY, et al., Appellees.

ANSWER TO MOTION TO RECONSIDER AND REAFFIRM THE
COURT'S ORDER OF JUNE 2, 1960, AND CROSS-MOTION TO
VACATE THE ORDER OF JUNE 2, 1960, AND TO DENY WITH-
OUT PREJUDICE APPELLEES' MOTION OF MAY 3, 1960--
Filed June 13, 1960

Appellants answer appellees' motion to reconsider and reaffirm the Court's order of June 2, 1960, and cross-move to vacate the order of June 2, 1960, and to deny appellees' motion to dismiss of May 3, 1960, without prejudice to the filing of a motion to dismiss in the Supreme Court of the United States or in any further proceedings which may eventuate from the proceedings in the Supreme Court of the United States.

1. On April 25, 1960, the Court denied appellants' motion to supplement the record "without prejudice to filing by appellants of a motion to substitute party appellees as provided for by Rule 25(d) of the Federal Rules of Civil Procedure and without prejudice to filing by appellees of a motion to dismiss 'his appeal as to appellee Neil H. McElroy in his individual capacity.'" On April 27, 1960, appellees moved "to substitute Appellee Thomas S. Gates as the party appellee in the office of Secretary of Defense." On May 18, 1960, the Court ordered that "Thomas S. Gates, Secretary of Defense, is substituted as an appellee in his office as Secretary of Defense in the place and stead

of Neil H. McElroy as Secretary of Defense." On May 24, 1960, appellants filed a petition for a writ of certiorari in the Supreme Court of the United States. *Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, Et. Al. v. Neil H. McElroy, Individually, Et Al.*, No. 953, October Term 1959. In the petition Neil H. McElroy was named a party respondent.

[fol. 224] At the time of filing the petition for a writ of certiorari, counsel for appellants did not know that there were any pending motions before this Court. On June 2, 1960, subsequent to the filing of the petition for a writ of certiorari, this Court entered an order that "insofar as this appeal relates to Neil H. McElroy as an individual the appeal is dismissed." Receipt of this order on June 3, 1960 was the first knowledge that counsel for appellants had of the pendency of a motion to dismiss the appeal as to Neil H. McElroy. Counsel for appellants had not before then received any such motion. Counsel for appellees, in their motion to reconsider and reaffirm this Court's order of June 2, 1960, admirably and frankly state that, after checking into the question of service, "we must conclude that a letter transmitting the motion was not, in fact, sent due to some administrative inadvertency" (p. 2).

In the absence of service of the motion to dismiss the appeal as to Neil H. McElroy, it would appear that the order of June 2, 1960, granting that motion should be vacated for lack of notice of and opportunity to be heard on the motion. Furthermore, the order was entered on June 2, 1960, subsequent to the filing of the petition for a writ of certiorari on May 24, 1960. Consequently, the order was entered after the case was already before the Supreme Court.

-The "Motion to Reconsider and Reaffirm the Court's Order of June 2, 1960 Granting Appellees' Motion to Dismiss as to Neil H. McElroy in His Individual Capacity," served on June 6, 1960, is in substance a renewal of the original motion to dismiss. Since the case is presently pending before the Supreme Court, this Court would appear to have no jurisdiction to entertain a motion to dismiss an appeal which is no longer before it. In any event, even

if jurisdiction exists, comity suggests that this Court should stay its hand and decline to dismiss an appeal as to a party who has already been named as a respondent in a petition for a writ of certiorari pending before the Supreme Court. In short, the case is now before the Supreme Court, and any further action to secure dismissal as to Neil H. McElroy should be taken in the proceedings before that court.

[fol. 225] 2. It would appear that analytically the sole basis for dismissing the appeal as to Neil H. McElroy would be that as a matter of substantive law there is no merit in the claim to recover from him money damages caused by the alleged wrong. *Parr v. Matteo*, 360 U.S. 564, which holds that damages are not recoverable from an officer for his performance of an *authorized* act from *improper* motives, adopts in substance the rationale of *Gregoire v. Biddle*, 177 F.2d 579 (C.A. 2). 360 U.S. at 571-572. The latter case is explicit that "The decisions have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers. . . ." 177 F.2d at 581. In this case the gravamen of the claim is, not improper motive, but action taken which is unauthorized or unconstitutional. Action by an officer which is unauthorized or unconstitutional is not "within the scope of his powers. . . ." And, as this Court put it, immunity exists only when the officers are "acting within the scope of their official authority" *Jones v. Kennedy*, 73 App. D.C. 292, 121 F.2d 40, 42, cert. denied, 314 U.S. 665. The "question here is, as it is in all cases where this doctrine of immunity is advanced, were these officials acting within the scope of their authority in the performance of the duties of their respective offices?" *Gibson v. Reynolds*, 172 F.2d 95, 98-99 (C.A. 8), cert. denied, 337 U.S. 925.

Upon the basis of this Court's disposition of this case, it had no occasion to reach the question whether, though unauthorized or unconstitutional, the harm caused by the action was not compensable by damages. For having found that no wrong was committed, it followed that no relief could be had, damages or otherwise. However, the subsequent dismissal of the appeal as to Neil H. McElroy, in

addition to the previous affirmance of the judgment as to him, necessarily required the Court to conclude that, even if he had taken unauthorized or unconstitutional action, no damages would be recoverable from him for any harm caused by his action. Since disposition of the appeal in favor of Neil H. McElroy does not require more than affirmance of the judgment, the Court may wish to defer decision of the question underlying dismissal of the appeal until this or another case assumes a posture which requires decision.

[fol. 226] Wherefore, the Court should vacate its order of June 2, 1960, and deny appellees' motion of May 3, 1960, without prejudice to the filing of a motion to like effect in the Supreme Court of the United States or in any further proceedings which may eventuate from the proceedings in the Supreme Court.

Respectfully submitted,

Bernard Dunau, 912 Dupont Circle Building, N.W.,
Washington 6, D.C., Attorney for Appellants.

Certificate of Service (omitted in printing).

[fol. 227] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 14,689

[Title omitted]

APPELLEES' ANSWER TO APPELLANTS' CROSS-MOTION TO
VACATE THE ORDER OF JUNE 2, 1960 AND TO DENY WITH-
OUT PREJUDICE APPELLEES' MOTION OF MAY 3, 1960—
Filed June 18, 1960

This is in opposition to appellants' cross-motion to vacate the order of June 2, 1960, and to deny without prejudice appellees' motion of May 3, 1960.

The appellants point out that they filed a petition for writ of certiorari in the Supreme Court on May 24, 1960 and suggest that appellees' motion to dismiss the appeal as to Neil H. McElroy should be dismissed without prejudice on the ground, *inter alia*, that "this Court would appear to have no jurisdiction to entertain a motion to dismiss an appeal which is no longer before it." The appellants further suggest that even if this Court has jurisdiction at this time to act on appellees' motion of May 3, that comity suggests that this Court should decline to dismiss an appeal as to a party who has already been named as a respondent in a petition for writ of certiorari.

As we have urged since the initiation of this case by the appellants, and on the basis of the authorities set forth in our brief and repeated in the motion to dismiss, we think it abundantly clear that appellee McElroy on the [fol. 228] facts in this record, cannot be held liable for damages in his individual capacity. The test applicable here, briefly stated, is whether the act complained of occurred in the course of official action and in an action which is within the scope of the duties of the governmental officer. If we are correct there is no reason why appellee McElroy should continue as a party to this action, in view of the substitution of appellee Gates, in his new capacity as Secretary of Defense. If appellee McElroy cannot be held individually liable, it would avail appellants nothing to have him continued as a party to the action regardless of the outcome of any action which may be taken by the Supreme Court in reviewing the judgment of this Court in this case.

As to the suggestion by the appellants that this Court has lost jurisdiction in the matter or should stay its hand because of comity, we think the suggestion is inaccurate.

Only after a writ of certiorari is granted would this Court lose jurisdiction of the case. "A writ of certiorari issued to a subordinate court operates as a supersedeas from the time of its service or of formal notice, suspending the power of the court to which it is issued to take further action in the case until it is finally disposed of by the reviewing court." *Waskey v. Hammer*, 179 F. 273.

"It is clear that this Court has jurisdiction to act while a petition for certiorari is pending and to do so is not a violation of the principle of comity. As Chief Justice Taft said when speaking for the Supreme Court in *Magnum Co. v. Coty*, 262 U.S. 159, "It involves no disrespect to this Court for the Circuit Court of Appeals to refuse to withhold its mandate or to suspend the operation of its judgment or decree pending application for certiorari to us. [fol. 229] If it thinks a question should be ruled upon by this Court, it may certify it. If it does not certify, it may still consider the case as one in which a certiorari may properly issue, and may in its discretion facilitate the application by withholding the mandate or suspending its decree. This is a matter wholly within its discretion."

Wherefore, it is respectfully submitted that appellants' Cross-Motion to Vacate the Order of June 2, 1960 and to Deny Without Prejudice Appellees' Motion of May 3, 1960 should be denied and that Appellees' Motion to Reconsider and Reaffirm the Court's Order of June 2, 1960 should be granted.

Respectfully submitted,

J. Walter Yeagley, Assistant Attorney General;
DeWitt White, George B. Searls, Attorneys, Department of Justice, Attorneys for Appellees.

Certificate of Service (omitted in printing).

[fol. 230]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Appellants,

v.

THOMAS S. GATES, individually, and as Secretary of
Defense, et al., Appellees.

Before: Prettyman, Chief Judge, Edgerton, Wilbur K.
Miller, Bazelon, Fahy, Washington, Danaher, Bastian, and
Burger, Circuit Judges, in Chambers.

ORDER REAFFIRMING ITS ORDER OF JUNE 2, 1960, DISMISSING
THE APPEAL AS TO NEIL H. McELROY—June 30, 1960

On consideration of appellees' motion to reconsider and
reaffirm the court's order of June 2, 1960, of appellants'
answer and cross-motion to vacate the order of June 2, 1960,
and of appellees' reply, it is

Ordered by the court that appellees' motion to reconsider
is granted and the order of this court entered herein on
June 2, 1960, dismissing this appeal insofar as it relates to
Neil H. McElroy as an individual is reaffirmed.

Per Curiam.

Dated: June 30, 1960.

[fol. 231]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 14,689

[Title omitted]

MOTION TO TRANSMIT ADDITIONAL PARTS OF THE RECORD
IN THIS COURT TO THE SUPREME COURT—Filed October
20, 1960

On May 24, 1960, the appellants in this case filed a petition for writ of certiorari in the Supreme Court. Subsequent to the filing of the petition for writ of certiorari, this court granted appellees' motion of May 3, 1960 to dismiss the appeal as to Neil H. McElroy in his individual capacity, and this order was reaffirmed by order of June 30, 1960.

On October 10, 1960, the Supreme Court granted the petition for writ of certiorari to review this court's judgment of April 14, 1960 in this case. The appellants did not file a petition for writ of certiorari from this court's order of June 30, 1960, dismissing the appeal insofar as it relates to Neil McElroy in his individual capacity. Appellees' motion of May 3, 1960 to dismiss as to Mr. McElroy and the subsequent motions and orders relating thereto have not been transmitted to the Supreme Court, since the appellants' designation of the record was filed on April 25, 1960, prior to the filing of the aforesaid motions and orders. [fol. 232] Appellees therefore move for the preparation by the Clerk of a certified copy of the following parts of the record in this court to be transmitted to the Supreme Court of the United States for use in that Court's consideration of this case:

1. Appellees' Motion of May 3, 1960 to dismiss the appeal as to Neil H. McElroy in his individual capacity.
2. Order of June 2, 1960 granting the Motion to Dismiss as to Neil McElroy.

3. Appellees' Motion of June 7, 1960 to Reconsider and Reaffirm the court's order of June 2, 1960.
4. Answer to Motion to Reconsider and Reaffirm the court's order of June 2, 1960 and cross-motion to vacate the order of June 2, 1960.
5. Appellees' Answer to Appellants' Cross-Motion to Vacate the order of June 2, 1960.
6. Order of June 30, 1960 reaffirming order of June 2, 1960 dismissing the appeal insofar as it relates to Neil McElroy as an individual.

J. Walter Yeagley, Assistant Attorney General;
George B. Searls, DeWitt White, Attorneys,
Department of Justice, Attorneys for Appellees.

Certificate of Service (omitted in printing).

[fol. 233] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 234]

SUPREME COURT OF THE UNITED STATES

No. 97, October Term, 1960

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., Petitioners,

vs.

NEIL H. McELROY, et al.

ORDER ALLOWING CERTIORARI—October 10, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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FILE COPY

No. ~~958~~ 97

Office-Supreme Court, U.S.

FILED

MAY 14 1959

JAMES R. BROWNING Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*

v.

NEIL H. McELROY, Individually; THOMAS S. GATES,
Individually and as Secretary of Defense; D. M.
TYREE, Individually and as Superintendent of the
United States Naval Gun Factory; and H. C.
WILLIAMS, Individually and as Security Officer of
the United States Naval Gun Factory, *Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No.

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*

v.

NEIL H. McELROY, Individually; THOMAS S. GATES,
Individually and as Secretary of Defense; D. M.
TYREE, Individually and as Superintendent of the
United States Naval Gun Factory; and H. C.
WILLIAMS, Individually and as Security Officer of
the United States Naval Gun Factory, *Respondents*

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

Cafeteria and Restaurant Workers Union, Local 473,
AFL-CIO, and Rachel M. Brawner pray that a writ of
certiorari issue to review the judgment of the United
States Court of Appeals for the District of Columbia

Circuit entered in the above-entitled case on April 14, 1960.

OPINIONS BELOW

The en banc opinion of the Court of Appeals, Judges Edgerton, Bazelon, Fahy and Washington dissenting, is not yet reported (*infra*, p. 1a). The opinion of the division of the Court of Appeals reversed by the en banc decision, Judge Danaher dissenting, will not be reported (*infra*, p. 42a).¹

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1960 (*infra*, p. 45a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A civilian nongovernmental employee works as a short order cook at a cafeteria located within the premises of the Naval Gun Factory. The employee works for a civilian nongovernmental employer who operates the cafeteria under a contract with the Naval Gun Factory. The superintendent of the Naval Gun Factory and his security officer cause the employee to lose her job at the cafeteria because she allegedly fails to meet the "security requirements." There was no disclosure of what the security requirements constitute, no statement of reasons particularizing the respects in which the employee allegedly failed to satisfy them, and no hearing of any kind at which to know or meet the evidence supporting the bare conclusion. The question presented is whether the officers acted

¹ An order entered on April 18, 1960, withdrew the division's opinion and stated that it would not be published.

without authority, and if their action was authorized, whether it was constitutional.

STATUTES INVOLVED

The constitutional, statutory, and administrative provisions deemed relevant by the Court of Appeals, to which should be added the First and Fifth Amendments of the Federal Constitution, are excerpted in the court's opinion, *infra*, pp. 5a-9a.

STATEMENT

M & M Restaurants, Inc., a civilian nongovernmental employer, operated three main cafeterias for and on the premises of the United States Naval Gun Factory, a naval installation located within the District of Columbia on federal property (R. 4, 90, 93, 107). The cafeterias were operated pursuant to an "Agreement For Food Services Concessionaire" entered into between M & M and the Board of Governors of the Naval Gun Factory Cafeterias. The personnel of the Board of Governors, composed of seven civilian governmental employees employed by the Naval Gun Factory, are appointed by the superintendent of the Naval Gun Factory. (R. 5-6, 90, 94.) Section 5(b) of the concessionaire agreement provides that (*ibid.*, emphasis supplied):

The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this Agreement. *In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who*

(i) fail to pass satisfactory medical examinations where the handling of food is involved;

(ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;

(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity.

*One of the cafeterias operated by M & M for the Gun Factory is known as the Bellevue Annex Cafeteria. Petitioner Rachel M. Brawner, a civilian non-governmental employee, worked at that cafeteria as a short order or breakfast cook for six and one-half years until her separation from that employment on November 15, 1956. Her employment record was completely satisfactory and she was above average in the discharge of her duties. (R. 6, 27, 39-41, 62, 90, 94.)

On November 14, 1956, a representative of the Board of Governors telephoned Harold R. Baker, supervisor of the M & M cafeterias at the Gun Factory, to request that M & M have petitioner Rachel Brawner turn in her identification badge (R. 7, 90, 94). Baker was informed that the security officer of the Gun Factory had advised that a question of security clearance for Brawner existed and that he, the security officer, would no longer permit her to have the badge (R. 7, 36-37, 56, 90, 98).

An identification badge is required to secure entrance to and exit from the grounds of the Gun Factory (R. 7, 90, 94). In the course of her employment at the cafeteria Rachel Brawner had no access to classified information (R. 8, 68, 94, 99).

On November 15, 1956, M & M relieved Brawner from work at the cafeteria, and instructed her to proceed to the office of Harold R. Baker, M & M's supervisor. There, Baker stated to Brawner that he had been requested to pick up her identification badge, and, when asked why, he stated "for security reasons." Shocked and surprised, Brawner denied that she had ever done anything to bring her security status into question, and she asked what recourse she had. Baker stated he could not tell her anything except that he had been directed to pick up her badge. He suggested that she might see the security officer, or the superintendent, or Oliver T. Palmer, the business agent of Petitioner Local 473. Brawner turned in her badge. (R. 12, 41-42, 61, 90.) As Brawner testified at the ensuing arbitration hearing (R. 41-42):

Well, when I first went in, I sat down and Mr. Baker told me that he was sorry, that he had been told to pick up my badge, and I asked Mr. Baker what for, and he said: "For security reasons."

I said "What about security? I haven't did anything. I don't know anything that I did."

And he said: "That's all I know, to pick up your badge."

I said: "What must I do or who do I see?"

He said: "Write a letter to the Superintendent of the Yard," and he said "I would"—well, he said if he were me, he would write a letter to the superintendent.

* * *

I turned my badge over to Mr. Baker, and he asked the clerk to write me a slip of paper to get out of the gate, so that I could show it to the Marine on the gate.

Baker testified at the arbitration hearing that he observed that "naturally it upset her a great deal"; he noted that "I could not tell her anything except I had been directed to take such an action"; and he "tried to explain to her the several steps which I thought might be possible for her to follow, including going to the Security Officer himself, and to the Superintendent, and of course I also told her to see Mr. Palmer, her business agent" (R. 61).

The same day, November 15, 1956, Baker turned over Brawner's identification badge to the security officer. At that time, admittedly, the security officer gave no reason for his action, except to say that he would not permit her to continue to retain the badge because her security status was in question. Admittedly, neither before, then, nor thereafter did the security officer, the superintendent, the Board of Governors, or any other official give any explanation for this conclusion to either Brawner, Local 473, or M & M. (R. 8, 90, 94.)

Still the same day, November 15, 1956, immediately following her loss of employment, Rachel Brawner went directly to see Oliver T. Palmer, business agent of petitioner Local 473, and reported to him what had transpired (R. 8, 42, 91). Local 473 was the exclusive bargaining representative of M & M's employees at the Gun Factory cafeterias, having been certified as such by the National Labor Relations Board in 1942 (R. 45, 49-50, 90, 93). In each of the collective bargaining agreements between M & M and Local 473 since the inception of their bargaining relationship in September 1946, M & M has promised "not to suspend or discharge any employee without good and sufficient cause" (R. 5, 19, 50, 90).

At a meeting of representatives of M & M and Local 473 on November 20, 1956, and in ensuing correspondence between them, Local 473 protested that M & M's separation of Rachel Brawner was "without good and sufficient cause" and hence in violation of the collective bargaining agreement (R. 8-9, 20-21, 22-23, 45-48, 91). Local 473 repeatedly sought from M & M a statement of the reasons underlying the conclusion that Rachel Brawner did not meet security requirements (*ibid.*). M & M repeatedly replied that it did not know, and was unable to obtain from the security officer or the superintendent of the Gun Factory, an elucidation of the underlying reasons (R. 8-9, 21-22, 23, 26-28, 46-47, 91).

In connection with its attempt to secure a statement of reasons, Local 473 requested that a meeting be arranged with officials of the Gun Factory at which to discuss the matter, and that a fair hearing be accorded Rachel Brawner (R. 9, 46-47, 91). On December 12, 1956, M & M wrote the Board of Governors to request "that a meeting be arranged . . . for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner" (R. 9, 25, 91, 95). But the superintendent of the Gun Factory refused to meet, stating that "the meeting proposed . . . would serve no useful purpose and is therefore unnecessary" (R. 9, 10, 26-27, 59-60, 91, 100).

On January 11, 1957, Local 473 invoked arbitration of the dispute under the terms of the collective bargaining agreement, claiming that M & M "discharged Rachel Brawner without good and sufficient cause" (R. 10-11, 29-30, 91). On August 6, 1957, after hearing, the Board of Arbitration, one member dissenting, held that "Rachel Brawner was not discharged without

good and sufficient cause . . . " (R. 71). The majority based its conclusion on its views that (1) Rachel Brawner had not been discharged because M & M has "always said that her services were excellent and that they would put her back to work immediately if she could prevail on the government officials to restore her security badge" (R. 75); and (2) the "real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully, she contends) denied her physical access to the place of her employment" (R. 76). No member of the Board of Arbitration doubted the injustice done Rachel Brawner. The Chairman stated at the arbitration hearing that (R. 69-70):

. . . what opportunity did this woman have to state her case or to obtain any information, or get any clarification of the reason for the picking up of her badge, which is of course the pivotal or crucial step in this whole proceeding?

All she was told was "surrender your badge," and despite efforts by the Union, and by the Union counsel, to this day she has not been told what the charge is against her.

* * *

Not only was there no hearing or no clarification or no specification, but not even a statement on which the ultimate conclusion was reached. It was just said that she was not satisfactory from a security standpoint, which may mean anything.

And M & M's designee on the Board of Arbitration stated at the hearing that: "Our position is heartily in accord with the viewpoint of the Union on this, and we are in entire agreement and we hold no brief for the Security Officer's actions . . ." (R. 70).

Thereafter, on September 6, 1957, petitioners filed a complaint in the United States District Court for the District of Columbia, and on cross-motions for summary judgment, the complaint was dismissed (R. 132). The ensuing appeal was heard by a division of the Court of Appeals composed of Judges Edgerton, Fahy, and Danaher. After argument of the appeal, this Court decided *Greene v. McElroy*, 360 U.S. 474. Upon the authority of that decision, the division of the Court of Appeals reversed, Judge Danaher dissenting. Judge Edgerton in his opinion stated in part that (*infra*, p. 39a):

On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds; "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene v. McElroy*, 360 U.S. 474. What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

A petition for rehearing en banc was granted. A new majority, by a five to four vote, reversed the decision of the division, and affirmed the judgment of the District Court. The essence of the opinion of the new majority is that (1) governmental officers have unfettered power to control access to federal property, and that (2) Rachel Brawner, as a cook, could work elsewhere, and was therefore not totally debarred from employment. Judges Edgerton and Fahy adhered to

their earlier position, and they were joined in dissent by Judges Bazelon and Washington, the latter stating that "We agree with Judges Edgerton and Fahy that the case must be reversed on the authority of *Greene v. McElroy*" (*infra*, p. 42a).

REASONS FOR GRANTING THE WRIT

This is a security case. In it governmental officials take a position in the name of security more extreme than any that has yet been advanced. They assert, at least where the place of civilian nongovernmental employment is on federal property, that governmental officials may validly cause a civilian nongovernmental worker to lose his private employment on security grounds, without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to satisfy them, and without any hearing of any kind at which to know and meet the evidence supporting the conclusion. It is this position which the court below sustained and which requires review by this Court.

1. Judge Fahy noted "the obvious importance of the case" (*infra*, p. 38a). Civilian nongovernmental employment on federal property is a commonplace. Respondents' petition for rehearing en banc below states that: "It is estimated that in all of the armed services there are several hundred thousand persons in positions similar to appellant Brawner's" (R. 152). Illustrative is the operation and maintenance by civilian nongovernmental personnel of a guided missiles range base at Cape Canaveral, Florida, on behalf of the United States Air Force (*Pan American World Airways, Inc.*, 115 NLRB 493), and the maintenance of

army aircraft at the Fort Sill Military Reservation (*International Association of Machinists, Local Lodge 889*, 120 NLRB 753, 755-756; *Page Aircraft Maintenance, Inc.*, 123 NLRB No. 23, 43 LRRM 1383). Similarly, of the 2,600 employees represented by petitioner Local 473 within the District of Columbia and environs, 2,000 are employed in cafeterias and restaurants located within governmental buildings (R. 52). *National Food Corporation*, 88 NLRB 1500 (Pentagon Post Restaurant). The decision below, therefore, cuts wide and deep into a significant area of private employment.

2. The decision below conflicts with this Court's decision in *Greene v. McElroy*, 360 U.S. 474. The Navy Civilian Personnel Instructions, quoted by respondents in their brief below at pages 16-17, state that: "The services operated by concessionaires are classed as private enterprises; they acquire none of the status of a government instrumentality and *their employees have the same legal status as do employees of any private employer.*" (Emphasis supplied.) This Court in *Greene v. McElroy* decided the status of an employee of a private employer whose employment was adversely affected by the Secretary of Defense or his subordinates on security grounds. It held that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). In this case Rachel Brawner without such authorization was deprived of her job with no hearing at all. Judge Fahy stated for the dissenting judges that "A decision is rendered which four of us think clearly

inconsistent with principles laid down by the Supreme Court in recently reversing this court in *Greene v. McElroy*" (*infra*, p. 37a). So long as *Greene v. McElroy* stands, the decision below cannot. Thus:

(a) William Greene was given a limited hearing which did not include the safeguards of confrontation and cross-examination. Rachel Brawner was given no hearing at all. And in oral argument in *Greene v. McElroy*, in a colloquy between Mr. Justice Harlan and the Solicitor General, the Solicitor General conceded that at least some hearing was indispensable to satisfy the prerequisites of due process (27 U.S. Law Week 3275, 3277-78, April 7, 1959):

Mr. Justice Harlan: "Is it your position that the government would have the right to discharge employees without a hearing?"

[Solicitor General:] "The Wieman case, 344 U.S. 183, presents a problem there. Under that case, the standard cannot be irrational. But here the basic question is whether the man has a right to government secrets as a matter of due process. The ultimate question is, if the government has a hearing and has information of a confidential character from an undercover agent and that person has seen the employee actively participating in a Communist cell, is this Court going to tell the government that it must disregard such information."

* * *

Mr. Justice Harlan: "What you are saying in effect is that due process is satisfied if the agency gives the employee an opportunity to be heard in his defense. Could the government discharge him without a hearing?"

"It might be so irrational that it couldn't be done."

"Then due process requires some kind of a hearing?"

"Yes. A process of balancing is involved."

"Then the government can't deny the right to a hearing of some kind?"

"I don't think so."

(b) William Greene had access to classified information. Rachel Brawner had none (R. 8, 68, 94, 99). Yet the court below holds that an employee with no access to classified information need be given no hearing at all, although this Court has held that a limited hearing was an unauthorized basis for causing an employee with access to classified information to lose his job.²

(c) The Court below states that, unlike the "line of authorization" found wanting in *Greene v. McElroy*, in this case "the authority dealing with entrance upon naval installations . . . is clear and ample" (*infra*, p. 21a). But, just as in *Greene v. McElroy*, the showing is devoid of "explicit authorization from either the

²While it would make no difference even if it were true, the attempt of the court below to suggest that Rachel Brawner may indeed have been privy to classified information is revealing. It states: "A naval installation such as a gun factory is in and of itself a confidential matter of highest priority and many of its vital features are observable by anyone on the premises" (*infra*, pp. 18a-19a). This is a security concept which even the Department of the Navy disclaims. Section 0201 of the United States Navy Security Manual for Classified Matter states that: "An individual does not have access to classified matter by being in a place where such matter is kept, provided the security measures which are in effect prevent him from gaining knowledge of such classified matter." (Emphasis supplied.) We presume that respondents do not assert that the security measures at the Gun Factory are not adequate to keep a cook from acquiring information she should not have.

President or Congress" empowering administrative deprivation of a private employee's job on security grounds "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (360 U.S. at 508, emphasis supplied). *A fortiori*, in this case, there is no showing that the President or Congress "specifically has decided" (*id.* at 507) to delegate the even more expansive prerogative of acting without any hearing at all. Since *Greene v. McElroy*, on February 20, 1960, by Executive Order No. 10865, in determining whether authorization for access to classified information should be denied or revoked, the President has required the Secretary of Defense and other enumerated department heads to afford the applicant a hearing, including with certain limitations "an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue . . ." (Sec. 4(a)).

Indeed, unlike *Greene v. McElroy*, there is in this case not even a showing of *departmental* authorization, much less executive or congressional sanction. To establish departmental authorization respondents rely primarily upon Chapter 14, Visitor Control, Department of the Navy Security Manual for Classified Matter. They assert that petitioner Rachel Brawner is in the category of a "visitor" to the Gun Factory premises, and that by Section 1409 of the manual the "commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted" (R. 119). But, as Judge Fahy stated, "Appellant Brawner was not a visitor or a tradesman or tradesman's agent within the meaning of the regulations controlling the access of these persons to the premises" (*infra*, p. 43a).

On the contrary, Chapter 15 of that very manual, titled Personnel Security Investigations And Clearances For Access To Classified Information, negatives any departmental authority to deprive a private employee of his job on security grounds without a hearing of any kind. Section 1501(b) of that chapter, in advertising to "Private contractors and contractors' employees requiring access to classified information," and Section 1509, titled "Investigation Requirements For Contractor Personnel," both state "Refer to the Armed Forces Industrial Security Regulation (OPNAV Instruction 5540.8A or subsequent revisions)." Section 72.2-202(a) of that regulation, as reported at 20 Fed. Reg. 6773, states in part that: "The clearing authority shall complete all actions necessary for the granting of a personnel security clearance and will determine whether to grant the clearance or refer the case to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation." It was thus the latter regulation which the Navy manual commanded Navy personnel to comply with in dealing with the security clearance of contractors' employees. It was the latter regulation which was before this Court in *Greene v. McElroy* (360 U.S. at 494, n. 23), and which this Court invalidated for want of executive or congressional authorization. And it was the latter regulation which constituted the sole departmental authority available to respondents in this case. Thus respondents denied petitioner Rachel Brawner, who had no access to classified information, even the safeguard of a limited hearing which the regulation vouchsafed to employees with access to classified information. It turns things upside down for respondents to assert, as they must, that they had

departmental authority to accord no hearing to an employee who had no access to classified information, when by their own regulation they were required to accord at least a limited hearing to an employee with access to classified information.

Finally, since none of the administrative material upon which respondents rely was published in the Federal Register as required by Section 3(a) of the Administrative Procedure Act, respondents' action was unauthorized upon this independent ground.

(d) The Court below states that *Greene v. McElroy* is different from this case because, as William Greene is an aeronautical engineer and Rachel Brawner is a cook, denial of security clearance to Greene meant "total debarment from an occupation" (*infra*, pp. 15a, 17a, 21a, 22a), whereas Brawner could continue to work at "scores of places open to short-order cooks here and everywhere" (*infra*, p. 18a).

(i) Even if it were true that the sole injury suffered by Rachel Brawner was the loss of her particular job in the Gun Factory cafeteria which she had held for six and one-half years, it would be injury enough. *Peters v. Hobby*, 349 U.S. 331, teaches as much. Dr. Peters was a professor of medicine at Yale University. He was employed as a Special Consultant in the United States Public Health Service. His services in that capacity comprised four to ten days each year, for which he was compensated at a specified *per diem* rate for days actually worked. 349 U.S. at 333-334. Yet that was held to be a sufficient interest to entitle Dr. Peters to protest his debarment from federal employment. And this was so despite the absence of the slightest suggestion that his work in his chosen field was impaired, for there is no intimation that

Dr. Peters' full-time employment at Yale University as professor of medicine was jeopardized in the least. If a medical consultant's four to ten days employment in that capacity in an annual period is sufficient, surely a cook's full-time employment is entitled to the protection of the law. And the penultimate sentence of this Court's opinion in *Greene v. McElroy* identified the injury to William Greene as the loss of "his job" (360 U.S. at 508).³

(ii) Rachel Brawner's loss of her job at the Gun Factory caused her a permanent economic injury from which she can never recover regardless of her securing a comparable job elsewhere. She had six and one-half year's seniority when she was discharged. Under a collective bargaining agreement, among other things, seniority protects the older employee from layoff until the employees junior to him have been furloughed. Without returning to the employment from which she was discharged, Rachel Brawner can never regain the six and one-half years' seniority she lost. However comparable any job may be with any other employer, Rachel Brawner must start at that new employment with zero seniority. And it hardly needs to be added that the "seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived." *Elder v. New York Central R. R. Co.*, 152 F. 2d 361, 364 (C.A. 6).

³ In *Taylor v. McElroy*, 360 U.S. 709, a companion case to *Greene v. McElroy* dismissed as moot, the employee denied clearance and consequently discharged was a lathe operator and tool and die maker. Mootness aside, is it conceivable that the result in *Taylor v. McElroy* would have been different from *Greene v. McElroy* because there are "scores of places open to" a lathe operator and tool and die maker "here and everywhere"?

(iii) But it is not even true that Rachel Brawner has lost only her particular job and its perquisites. Her employment opportunities generally have been drastically curtailed. Respondents themselves conceded in their petition for rehearing below that Rachel Brawner cannot be employed by "operators of restaurants and cafeterias . . . located on military installations in and around the Washington area" (Pet. p. 6). The injury is wider and deeper than that. As Oliver T. Palmer, business agent of petitioner Local 473, testified at the arbitration hearing (R. 52):

An employee who may be discharged as a security risk has not a ghost of a chance of getting a job in a Government cafeteria, and it is very difficult to obtain employment for any employee who has that tag on them, in any cafeteria. That is a problem, and if they have that tag, it is almost impossible to find them another job.

Rachel Brawner's effective debarment from private employment in cafeterias and restaurants operated by private employers on governmental premises is a serious inroad into her employment opportunities. Of the 2,600 employees represented by Local 473, 2,000 are employed in cafeterias and restaurants located within governmental buildings (R. 52). And, as the business agent testified, even private employment on nongovernmental premises becomes "very difficult to obtain . . ." (R. 52).⁴

⁴ Were it material, a trial would establish that from her discharge on November 15, 1956 to November 1, 1959, a period of 154 weeks, Rachel Brawner has been gainfully employed for about 57 weeks, or about 37 percent of the time, in contrast with her full time employment for six and one-half years before her discharge.

(iv) The injury from deprivation of employment on security grounds is not confined to economic loss. The stigmatization of reputation is a gnawing wrong. As Judge Fahy stated, "The public draws no sharp distinction between security and loyalty. *Cf. Vitarelli v. Seaton*, 359 U.S. 535. As the Supreme Court has said of exclusion from public employment on disloyalty grounds, 'In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy.' *Wieman v. Updegraff*, 344 U.S. 183, 191. Engineer and cook alike suffer, in spirit and in reputation. They should have equal protection" (*infra*, p. 38a).

(v) The court below seems to stress that M & M offered Rachel Brawner employment at the Skylark Motel which it operated at Springfield, Virginia (*infra*, pp. 3a, 18a), an offer which was rejected because the location was unsatisfactory (R. 131). This offer has no relevance to respondents' wrongs in causing Brawner to lose her employment at the Gun Factory cafeteria, in impairing her opportunity to obtain employment elsewhere, and in besmirching her reputation. No one is free to invade a person's rights in one place because the victim can exercise them in another place. *Cf. Schneider v. Irvington*, 308 U.S. 147, 163. The offer of employment would be relevant, if relevant at all, only to the question of mitigating damages, and whether the offer does go towards mitigation depends on such factors as the distance of the proffered job from Brawner's home, the availability and cost of public transportation, the time consumed in going to and from work, the kind of job it is, the rate of pay, and the working conditions.

In sum, *Greene v. McElroy* cannot be distinguished upon the ground that William Greene was hurt but Rachel Brawner was not. Both suffered enough, and it is an almost insulting irrelevancy to ask who suffered more.

(c) The court below states that *Greene v. McElroy* is different because William Greene worked on private property while Rachel Brawner worked on federal property. Denial of access to her place of employment within the grounds was, so the court states, in the exercise of the commanding officer's "right to protect entrance to the Factory"; "we fail to perceive any limitation upon the discretion of the commanding officer in respect to civilian presence within his command", nor any public right which would "act as a restriction upon the otherwise unfettered discretion of naval officers in such a matter" (*infra*, p. 13a).

On this premise, had William Greene worked on federal property, his employment could have been destroyed and his reputation besmirched with no hearing at all, via the power to control access to governmental land. We were unaware that authorization for acts done by a governmental official is unnecessary if the acts are performed on land owned and occupied by the sovereign. Nor were we aware that the Constitution stops at the entrance to a Navy installation. Cf. *Reid v. Covert*, 354 U.S. 1; *Kinsella v. Singleton*, 361 U.S. 234; *Grisham v. Hagan*, 361 U.S. 278; *McElroy v. Guagliardo*, 361 U.S. 281. Denial of bare access to the premises unaffected by any other interest would be one thing, but debarment from the grounds on security considerations with the consequence of job loss, employment opportunity impairment, and reputation besmirchment is quite another. A man's home

may be his castle, but that does not mean he may drive his wife and children from it. Nor does federal ownership of the premises on which the Gun Factory is located mean that officials may destroy the employment and sully the name of persons working within the grounds.

As Judge Edgerton observed (*infra*, pp. 39a-40a), were the premise sound, no governmental employee could ever have successfully challenged his ouster from public employment on security grounds. For the short answer to his protest would have been that the sovereign cannot be required to permit him to work in a building it owns and from which his entry could be barred. But this Court has required the restoration to public employment of governmental employees, both because the ouster was in excess of or not in conformity with the authority conferred (*Cole v. Young*, 351 U.S. 536; *Peters v. Hobby*, 349 U.S. 331; *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535), or because the authority conferred was constitutionally invalid (*Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Board of Higher Ed.*, 350 U.S. 551). And the "liberty [of persons in private employment] to follow their chosen profession is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job." *Parker v. Lester*, 227 F. 2d 708, 717 (C.A. 9).

Where a governmental manager, installed by a federal agency to supervise a village owned by the federal government, denied a person the right to religious proselytism in that village, this Court held it no defense that "the federal Government owns and operates the village. * * * Certainly neither Congress nor Federal agencies acting pursuant to Congressional authoriza-

tion may abridge the freedom of press and religion safeguarded by the First Amendment." *Tucker v. Texas*, 326 U.S. 517, 520. As this Court said of a company-town wholly owned by a corporation, so with the premises of the Gun Factory wholly owned by the Government, "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501, 505-506. Within our scheme of limited powers, federal officers are not lords of the manor empowered to do as they will.

3. If respondents' action be authorized, it offends the Fifth Amendment. The only alternative to concluding that Rachel Brawner was denied due process is to assert that she is entitled to none. Not only is the total subjection of the individual to the uncontrolled will of the officers offensive to due process (*Yick Wo v. Hopkins*, 118 U.S. 366-367), it conflicts with the First Amendment as well. Under the regime of absolute governmental power manifest by this case the only safety of the citizen against official oppression—if he is safe even then—is to speak only banalities, to read or write only commonplaces, and to associate with none about whom an eyebrow could be raised. Anything less than unrelieved anonymity exposes the individual to the risk of governmental condemnation as a security

risk without even the right to know the why or the where, much less to defend. In this environment every value that the First Amendment is designed to protect against governmental abridgment would perish.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 1960.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., APPELLANTS

v.

NEIL H. McELROY, Individually and as Secretary of
Defense, et al., APPELLEES

Appeal from the United States District Court
for the District of Columbia

On Rehearing En Banc

Decided April 14, 1960

Mr. Bernard Dunau for appellants.

Assistant Attorney General Yeagley, of the bar of the Supreme Court of Indiana, *pro hac vice*, by special leave of court, with whom *Messrs. Leo J. Michaloski, Jerome L. Aredon, and Justin R. Rockwell*, Attorneys, Department of Justice, were on the brief, for appellees. *Mr. George B. Scars*, Attorney, Department of Justice, also entered an appearance for appellees.

Before PRETTYMAN, Chief Judge, and EDGERTON, WILBUR K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHY, BASTIAN and BURGER, Circuit Judges.

PRETTYMAN, *Chief Judge*: Rachel M. Brawner was a short-order cook—a “breakfast cook”. In November, 1956,

she worked in a cafeteria. Her duties were to prepare breakfast and lunch, attend the steam table, and wash dishes. She had been so employed for six and a half years. The cafeteria is located on Government property, the premises of the Naval Gun Factory. The land had been purchased by the United States in 1873. It is located in the District of Columbia and became part of the Gun Factory in 1945. The work of the Factory includes, *inter alia*, design, planning, production and inspection of naval ordnance.

The cafeteria was operated by a private corporation, M & M Restaurants, Inc., under a written contract with the Board of Governors, U. S. Naval Gun Factory Cafeterias. The Board of Governors is composed of seven civilian governmental employees of the Factory and is appointed by the Superintendent. M & M Restaurants, Inc., operates numerous cafeterias and restaurants in several states, including Delaware, Maryland and Virginia. It operates the three main cafeterias at the Gun Factory. In order to enter or leave the premises of the Gun Factory, an identification badge is required. The issuance of this badge is by the Security Officer of the Gun Factory, a subordinate of the Superintendent, both of whom are naval officers. The Gun Factory is a component activity of the Potomac River Naval Command. The Commandant of this Command is directly responsible to the Chief of Naval Operations.

Rachel Brawner was required to have, and did have, an identification badge. On November 15, 1956, she was notified by her supervisor that he had been told to pick up her badge "for security reasons". She surrendered her badge to him. This action of the supervisor was pursuant to a phone call from a representative of the Board of Governors to a representative of M & M Restaurants, Inc. The caller stated that the Board had been notified by the Security Officer of the Naval Gun Factory, a Lieu-

tenant Commander, that Brawner would have to surrender her badge and would not be permitted to enter the Factory "until clearance is certified by the Security Officer."

The President of M & M Restaurants, Inc., offered Brawner employment at the Skylark Motel in nearby Springfield, Virginia, where a restaurant was operated by the company. The representative of the Union, on behalf of Brawner, notified the company that she was not interested in accepting the proffer.

The Chairman of the Board of Governors made a request of the Superintendent of the Factory that a meeting be arranged for the Security Officer, the Board of Governors, representatives of M & M Restaurants, Inc., and agents of the Union to discuss the action relative to Brawner. The Superintendent replied that the agreement between the Board of Governors and M & M Restaurants, Inc., stipulated that the latter should employ only those who met the security requirements for admission to the Factory and that it was considered that Brawner "does not meet these security requirements". The Superintendent added that the proposed meeting was therefore unnecessary.

In the meantime Brawner had called upon the business agent of the local of the Union which was the bargaining representative of the cafeteria workers. This representative discussed the matter with the President of M & M Restaurants, Inc. The contract between the Union and the company provided that the employer would not suspend or discharge any employee without good and sufficient cause.¹ It further provided that in the event of a dispute the matter should be referred to a board of arbitration of three parties, one of whom might be chosen

¹ Clause 6 of the agreement between M & M Restaurants, Inc., and the Union contained the following: "The Employer agrees not to suspend or discharge any employee without good and sufficient cause."

by the American Arbitration Association.² The representative of the Union was informed by the President of the company that he could not supply any information concerning the taking of Brawner's badge. Thereupon the dispute was referred to a board of arbitrators composed of John B. Cullen, Esquire, named by the company, Samuel H. Jaffee, Esquire, named by the Union, and the Honorable Nathan Cayton, named by the American Arbitration Association. These arbitrators, Mr. Jaffee dissenting, found: "The evidence before us does not establish that Rachel Brawner was ever discharged by the Company. There was no evidence from which it can be said that the Company ever indicated any desire or intention to terminate or dispense with her services." The arbitrators further pointed out: "The real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully she contends) denied her physical access to the place of her employment."

In sum the facts are that Rachel Brawner, a short-order cook employed by the civilian concessionaire operator of a cafeteria located on the premises of the Naval Gun Factory, was denied retention of the identification badge which had permitted her to enter the premises where she worked, the

² Clause 24 of the agreement provided: "The parties agree that they will endeavor to adjust any dispute that may arise from the interpretation or application of this Agreement within a period of 48 hours. In the event that no accord can be reached, the matter in dispute shall be referred to a Board of Arbitration within two days from the date which the parties to the Agreement shall fail to reach an agreement in connection with the matter in dispute, and said Board of Arbitration shall be composed of one representative of the Employer and one representative of the Union; and one disinterested party chosen by the two said members of the Board of Arbitration. In the event the two parties shall fail to agree on a third disinterested party, the parties agree that the American Arbitration Association be requested to appoint a person to serve in the capacity of the third and impartial arbitrator."

denial being by the authority of the naval officer in command of the Factory. The stated reason was that she failed to meet security requirements. She was not informed as to the factual premises for the conclusion. No charge was made against her.

After the foregoing events the Union and Mrs. Brawner filed a civil action in the District Court against the Secretary of Defense and other Government officials, in their individual and official capacities, and M & M Restaurants, Inc., for a declaratory judgment, injunctive relief, vacation of the arbitration award, and recovery of damages. The District Court granted summary judgment for the Government defendants and dismissed the complaint as to all defendants. This appeal followed.

I. The Problem Stated

The problem to be solved is a narrow one. It concerns the nature and extent of the power of a naval officer in command of a naval installation to control the ingress and egress of civilians to and from the premises. The discussion on the briefs and in argument has gone far afield from this problem. The case does not involve debarment from a chosen occupation. It is not a discharge case. The case does not involve any Personnel Security Program, with its concomitant regulations.

II. Power to Control Access to Naval Gun Factory

Line of Authority

We first examine the authority of the Navy to prescribe rules for the admission of civilians to Navy installations. The authority begins with the Constitution.

"The Congress shall have power to dispose of and make all needful . . . regulations respecting the territory or other property belonging to the United States; . . ."³

³ Art. IV, § 3, cl. 2.

"The Congress shall have the power . . . ;

"To exercise exclusive legislation in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States,"

"The Congress shall have the power . . . ;

"To provide and maintain a navy;

"To make rules for the government and regulation of the land and naval forces;"

The line of authority then proceeds by statutes.

"The Secretary of the Navy has custody and charge of all . . . property of the Department."⁶

"The head of each department is authorized to prescribe regulations, not inconsistent with law, for . . . the custody, use, and preservation of . . . property appertaining to it."⁷

"United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President."⁸

⁴ Art. I, § 8, cl. 17.

⁵ Art. I, § 8, cls. 13, 14.

⁶ 10 U.S.C. § 5031 (c), which was 5 U.S.C. § 413, which was R.S. 418, derived from an Act of April 30, 1798, ch. 35, § 3, 1 STAT. 554.

⁷ This section now appears as 5 U.S.C. § 22 (1958). It was R.S. 161, derived from a number of Acts, beginning with one of July 27, 1789, ch. 4, 1 STAT. 28. It was amended in respects not here material by Pub. L. No. 619, 85th Cong., 2d Sess. (Aug. 12, 1958), 72 STAT. 547.

⁸ 10 U.S.C. § 6011 (1958). This was 34 U.S.C. § 591, the source of which was R.S. 1547. In addition 10 U.S.C. § 121 (1958) provides: "The President may prescribe regulations to carry out his functions, powers, and duties under this title." This "title" of the United States Code was revised, codified and enacted into law by statute, being Pub. L. No. 1028, 84th Cong., 2d Sess., ch. 1041 (Aug. 10, 1956), 70A STAT. 1.

Next in this line of authority come certain United States Navy Regulations issued pursuant to Section 1547 of the Revised Statutes.⁹ They were issued by the Secretary of the Navy, the Honorable John L. Sullivan, and approved on that same day by the President, the Honorable Harry S. Truman. These Regulations contain the following provisions:

"The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations."¹⁰

"In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

"3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command."¹¹

"The commanding officer shall require that orders and regulations pertaining to the security of * * * classified * * * material * * * are strictly observed."¹²

"Definitions.

"1. '*Classified matter.*'—Information or material in any form or of any nature which in the public interest must be safeguarded in the manner and to the extent required by its importance."¹³

"Subject to law and as may be prescribed by the Secretary of the Navy, it shall be the duty of the Chief of Naval Operations to:

⁹ 34 U.S.C. § 591, codified Aug. 10, 1956, as 10 U.S.C. § 6011.

¹⁰ Regs. § 0701.

¹¹ *Id.* § 0734.

¹² *Id.* § 0713.

¹³ *Id.* § 1501.

"12. Prepare and issue manuals and other appropriate publications containing orders, instructions, and procedures, conforming to these regulations, and pertaining to matters for which he is responsible."¹⁴

"The Chief of Naval Operations shall supplement these regulations with appropriate publications including the Security Manual, . . ."¹⁵

The United States Navy Security Manual for Classified Matter, promulgated October 2, 1954, contained the following:

"Persons who are considered visitors . . . are divided into four basic categories which are further subdivided as follows:

"Category United States citizens . . .
One

"Baker Personnel of private facilities under contract to the Department of Defense."¹⁶
[meaning

(B)]

"The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted."¹⁷

The U. S. Navy Physical Security Manual promulgated by the Chief of Naval Operations on April 14, 1956, contained the following:

"Definitions |

"1. *Naval Activity.* A naval activity shall be construed to mean a unit of the Naval Establishment, of distinct identity, and established under an officer in command or in charge.
.

¹⁴ *Id.* § 0204.

¹⁵ *Id.* § 1502.

¹⁶ Security Manual § 1403.

¹⁷ *Id.* § 1409.

"3. *Facility.* A facility, for purposes of this instruction, is any building, shop or utility within an activity having a specific function."¹⁸

"*The Commanding Officer.* The Commanding Officer is responsible for the security of all property and installations within his command. He prescribes the security measures to be adopted, and coordinates when necessary, the measures adopted by subordinates, but he alone remains responsible for the overall security of his command."¹⁹

"*The Security Officer.* Normally, the Commanding Officer delegates most of the administrative and operational aspects of security to a subordinate, who is referred to in this manual as the Security Officer. The functions of this officer include planning, supervision, inspection, coordination, and submission of recommendations with respect to:

"a. Physical security

"(1) Internal security

• • • • •²⁰

"*Specific duties.* The planning, supervision and coordination of matters relating to the security of the command includes:

"a. *Internal security matters:*

"(1) Safeguarding from • • • the unauthorized disclosure of classified matter."²¹

It is argued by the Union that these Navy regulations and manuals were not published in the Federal Register pursuant to the requirements of Section 3 of the Adminis-

¹⁸ Physical Security Manual § 0100.

¹⁹ *Id.* § 0154.

²⁰ *Id.* § 0156.

²¹ *Id.* § 0156.3.

trative Procedure Act²² and the Federal Register Act²³ and thus were not valid. The section of the Administrative Procedure Act providing for publication begins:

"Except to the extent that there is involved (1) any function of the United States requiring secrecy in the public interest * * * —

"(a) Every agency shall * * * publish in the Federal Register [etc.]."

Certainly the operation of an agency for the design, planning and production of naval guns and other ordnance is a function requiring secrecy in the public interest. The Attorney General's Manual on the Administrative Procedure Act cites as an illustration of the meaning of the provision: "Thus, the War Department obviously is not required to publish confidential matters of military organization and operation * * *." Therefore, in so far as these regulations apply to the Naval Gun Factory, they need not be published in order to establish their validity. We are not concerned with their validity in any other application. Furthermore the provision of the Act to which we have referred excepts from publication "any matter relating solely to the internal management of an agency". In so far as these regulations prescribe the authority of the commanding officer over an installation such as the Gun Factory, they relate to the internal management of the Navy. The public effect is remote. The Committee Reports on the Bill which became the Administrative Procedure Act point out that the publication provisions were intended to make available to the general public such administrative operations and procedures as are public property. The authority of naval officers over naval operations can hardly be classified as public property. In so far as the Federal Register Act is concerned, no act of Congress required publication; the Navy regulations had

²² 60 STAT. 238 (1946), 5 U.S.C. § 1002 (1958).

²³ 49 STAT. 501 (1935), 44 U.S.C. § 305(a)(2) (1958).

not been designated by the President as applicable to the general public; and thus were not required by this statute to be published.

It therefore seems clear that naval officers in command of naval installations have ample authority to control the ingress and egress of civilians to and from the premises of the command.²⁴

The Exercise of Authority

The contract made October 1, 1955, between the Board of Governors of the Naval Gun Factory Cafeterias and M & M Restaurants, Inc., provided in part:

“ * * * In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who

“ (iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity.”²⁵

In answer to an interrogatory posed in this lawsuit by the plaintiffs to the defendants concerning the procedure followed by the officials of the Naval Gun Factory to determine whether a civilian, non-Governmental employee

²⁴ The Congress has recognized the existence of such authority by prescribing penalties for the unauthorized entrance upon such naval installations. See, e.g., 62 STAT. 765 (1948), 18 U.S.C. § 1382 (1958); 64 STAT. 1005 (1950), 50 U.S.C. § 797 (1958).

²⁵ Sec. 5(b). The predecessor contract, of December 1, 1949, in effect when Brawner was employed, provided in Art. IX(b): “Approval for the employment of any person by the Concessionaire to work in the Naval Gun Factory * * * shall be conditioned upon the right of the Superintendent, or his duly designated representative, to cancel, revoke or withdraw the same for any cause or reason deemed sufficient by the Superintendent, or his representative, in the exercise of discretion, without the necessity for any showing of cause.”

should be given an identification badge, the Governmental defendants answered that each applicant for an identification badge was required to complete an application form which contained the following: "I agree to obey all Naval Gun Factory Regulations * * *." The execution of such an undertaking by Brawner is implicit and not denied.

Not only do the Government officers have technical authority to protect the privacy of premises such as a naval gun factory, but the right to do so is a right of the highest priority in the public interest. No one, we think, would question that right or its priority. Certainly the realisms of the world situation dictate its necessity. On the other hand, no individual citizen has a natural or inherent right to enter such premises. And we find no statute which confers such a right upon civilians. The only right of entrance possessed by a civilian is a right gained by contract or by specific permission. Brawner's only right to enter the Gun Factory was a right which she gained by way of her contract of employment. It was derived from a combination of two contracts, one between the Government and her employer and the other between her employer and her. Brawner's only right of entrance was subject to the flat, unequivocal contract provision that employees permitted entrance to the Factory must meet the security requirements of the command. We do not see how a contract right of an employee of a contractor with respect to the subject matter of the contract can be superior to the rights of the contractor in respect to that subject matter. If the rights of a contractor-employer are subject to limitations, the rights of employees under the contract are subject to the same limitations.²⁶ Thus, for example, if a contract specifies a 40-hour work-week, no individual employee has a right to demand employment for 60 hours a week. Moreover we know of no rule of law or custom which requires that employees be in-

²⁶ 2 WILLISTON CONTRACTS § 364A & n. 5 and cases there collected (3d ed. 1959) ; *id.* § 394.

formed of the terms of the employer's contract, to which they are not parties but by virtue of which they gain their employment.

Thus it clearly appears that the commanding officer at the Factory had a high priority right to protect entrance to the Factory and the civilian Brawner had merely a right derived from a contract which specifically provided that she must meet the security requirements of the office. This being the situation, we fail to perceive any limitation upon the discretion of the commanding officer in respect to civilian presence within his command, except limitations imposed by higher naval authority. We find no rights of the public, or of any member thereof, which act as a restriction upon the otherwise unfettered discretion of naval officers in such a matter.

The contract between M & M Restaurants, Inc., and the Government contained no provision relating to procedure upon the denial of access to the Factory by an employee, but the contract between Brawner (via her representative, the Union) and her employer did provide a procedure in respect to disputes under that contract. It provided for arbitration. As we have seen, she was afforded that full procedure. She has had the full of her contractual procedural rights.

III. Power to Control Access versus Claimed Right to Employment at Naval Gun Factory

It is argued in Brawner's behalf that her right to employment was involved in her right to be daily upon this particular site; that this right to employment was a protected right; and that this protection reached through to create a protected right to be at a particular site of employment. We think principles applicable to employment as such are not applicable to the case we have before us. We discuss those principles only because they are pressed upon us and we think they reflect some erroneous premises which we are in duty bound to indicate.

Employment—a Qualified Right

In the first place it is obvious that no one has an unqualified right—inherent, statutory or constitutional—to enter upon such employment as he chooses. Qualification, or suitability, is a restriction upon any such right. For example, maintenance of strict secrecy in respect to certain matters which come naturally to an employee's knowledge in the ordinary course of his employment is a commonplace element of suitability for particular employment. Trade secrets in industry,²⁷ financial matters in business, official affairs in Government,²⁸ are within the scope of this custom. Furthermore the Government frequently requires that one be particularly qualified, even for private employment: for example, to be a nurse, or a barber, or an engineer, or a lawyer. A young man, even one out of college, has no unrestricted right to practice law. He must (1) study for a prescribed period and (2) qualify under tests sponsored by the judicial branch of the Government. It is after one has been qualified and licensed, or admitted, to a trade or profession that rights under contract or statute attach and a debarment from that occupation requires certain procedural steps.²⁹ And the same doctrine applies where Government action is of such nature as to be a factual debarment of the individual from his vocation or profession, even though not a formal disbarment or cancellation of license. This is what the Supreme Court was talking about in *Greene v. McElroy*,³⁰ as the Court repeatedly emphasized in its opin-

²⁷ See Blake, *Employee Agreements Not To Compete*, 73 HARV. L. REV. 625, 667-674 (1960).

²⁸ To take a simple example: a law clerk applicant may be a legal giant; he may have a most engaging personality; but, if he cannot be entrusted with judicial secrets, no judge would consider him suitable for appointment. The same principle obviously applies in all branches of the Government.

²⁹ See GELLHORN & BYSE, *ADMINISTRATIVE LAW* 768-779 (1954).

³⁰ 360 U.S. 474 (1959).

ion. The person there involved was an aeronautical engineer of such specialized training and capacity that access to classified information was essential to engagement in his profession. Denial of such access was a complete debarment.

Removal Process

No employed person has an inherent or natural right (i.e., a right apart from statute, regulation or contract) to any sort of process in respect to removal from his particular job.³¹ In private employment an employee's rights in respect to discharge stem from the contract of employment. This is and always has been established law; it is one of the basic reasons for trade unions. The rights of Government employees in respect to removal from employment stem from statute or from regulations adopted by the authority by which they were employed. This has been established law throughout the history of this country.³² Originally, as every student of history knows, the Executive authority had plenary power to remove summarily any and all Executive employees; and they did so.³³ The climax of the

³¹ 35 AM. JUR. *Master and Servant* §§ 26, 34 (1941) and cases there cited.

³² See, e.g., *Ex parte Duncan N. Henden*, 38 U.S. (13 Pet.) 230, 259 (1839); *Shurtleff v. United States*, 189 U.S. 311 (1903); *Myers v. United States*, 272 U.S. 52 (1926); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

³³ The history texts are replete with examples. FISH, *THE CIVIL SERVICE AND THE PATRONAGE* 13-14, 20, 26, 28, 39, 65, 120-121, 125, 130, 147, 153, 155, 160, 164, 166, 168, 170, 252, (1905); 4 CHANNING, *HISTORY OF THE UNITED STATES* 256-257 (1935); 5 CHANNING, *op. cit. supra* at 389 (1933); 6 CHANNING, *op. cit. supra* at 302 (1930); SCHUBERT, *THE PRESIDENCY IN THE COURTS* ch. 2 (1957); HACKER & KENDRICK, *THE UNITED STATES SINCE 1865*, pp. 99-100 (1934); HICKS, *THE FEDERAL UNION* 397 (1937); HART, *TENURE OF OFFICE UNDER THE CONSTITUTION* (1930); and see generally SAGESER, *THE FIRST TWO DECADES OF THE PENDLETON ACT: A STUDY OF CIVIL SERVICE REFORM* (Univ.

long fight for security in the civil service was the enactment of the Lloyd-La Follette Act in 1912. That Act, as amended, is still in force. It specifically provides: "No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay."³⁴

That statute has been discussed under attack many times in the courts, but no court has ever intimated a shadow of unconstitutionality in it. The law is clear. Absent an express statutory protection, any Government office, the tenure of which is not fixed by the Constitution or set by statute, is subject to removal at pleasure. This one thread is the warp of the whole fabric of the case law; it appears throughout—from *Ex parte Duncan N. Hennen* in 1839³⁵ to *Vitarelli v. Seaton* in 1959.³⁶ Except for special classes, Government employees may be removed summarily without charges, and except for the provisions of the Lloyd-La Follette Act, without reasons. A holding to the contrary would necessitate a ruling that the Lloyd-La Follette Act is and always has been invalid; that the hundreds of employees discharged under its procedural terms since 1912 were wrongfully discharged; and that Government employment at all levels carries life tenure, *i.e.*, inherent, constitutionally protected invulnerability to discharge, except upon charges, open hearings, confrontation by witnesses, cross-examination, and findings. Such conclusions have no support in law, in our opinion.

Studies, V. of Neb., 1935); FOULKE, FIGHTING THE SPOILSMEN (1919); Richardson, *Problems in the Removal of Federal Civil Servants*, 54 Mich. L. Rev. 219 (1955); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 GEO. WASH. L. REV. 285, 296 *et seq.* (1950).

³⁴ 37 STAT. 555, as amended, 62 STAT. 355 (1948), 5 U.S.C. § 652(a) (1958).

³⁵ 38 U.S. (13 Pet.) 230.

³⁶ 359 U.S. 535.

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Finally, absent a special contract or circumstances constituting a total debarment from an occupation, an employee has virtually no rights in respect to the situs of his employment. Grocery chains, public utilities, law firms, and notably the Government, move employees about from place to place willy-nilly. It would be fantastic to propose seriously that an employee of a large employer has some sort of procedural rights which must be respected before he can be moved from here to there. Certainly the Government's many moves in decentralization programs give no heed to any such notion.

The young lawyer in our analogy, *supra*, has no right to employment by any particular person or client, or indeed to any clients at all. And his place of employment, his continued engagement in any particular matter or by any particular client, are entirely at the whim of his employers. To take a simple example: If the Government were to retain as consultants a private law firm, and the firm sent one of its young lawyers to do some of the work; and if a Government officer called a senior member of the firm and said, "This young man is too gabby for our purposes. Don't send him over here any more"; the young lawyer would have no rights of procedural process of any kind, sort or description.

Again by way of analogy, certainly no one would doubt the authority of the Supreme Court to require its private printer to transfer a Linotype operator who, without wrongful intent, portrayed to his friends at afternoon stops in a convenient bar the nature of the opinions he was putting in print. No one would contend, we think, that the right of a Linotype operator to work on the advance printing of opinions of the Court is such that he could not be removed from the premises without a hearing in full panoply of charges, confrontation of witnesses, compulsory disclosures in public by his cronies, cross-examination, and findings. An investi-

gation sufficient to satisfy the Court of the afternoon garb-
rility of the employee and a quiet word to the printer would
be all such a situation would entail, we think. He could be
put to work somewhere else.

We come back to the problem as to Brawner. She was not
discharged. She was not debarred from her chosen occu-
pation. She was offered a similar job by her same em-
ployer, and she refused. There are scores of places open to
short-order cooks here and everywhere. The essence of her
claim is that the site of her employment cannot be changed
unless charges are made against her and she has a full
hearing with witnesses, etc. We find no substance whatever
to her claim.

Stigma

It is further argued in Brawner's behalf that the Govern-
mental action has besmirched her reputation. Of course, it
has consistently been held that outright dismissals from
Government employ, on stated grounds of malfeasance,
bribery, or even attempted seduction, are validly accom-
plished without the traditional trappings of due process.³⁷
And we see no comparatively greater defamation in a denial
of entrance to a naval installation because of its security re-
quirements. Nobody has said that Brawner is disloyal or is
suspected of the slightest shadow of intentional wrongdoing.
"Security requirements" at such an installation, like such
requirements under many other circumstances, cover many
matters other than loyalty. Certainly they must cover gar-
b- rility, honesty, a measure of judgment, sobriety, a high
sense of one's obligations, etc. A naval installation such as
a gun factory is in and of itself a confidential matter of

³⁷ *Eberlein v. United States*, 257 U.S. 82 (1918); *Golding v. United States*, 78 Ct. Cl. 682, *cert. denied*, 292 U.S. 643 (1934); *Kent v. United States*, 105 Ct. Cl. 280 (1946); *Richardson, Problems in the Removal of Federal Civil Servants*, 54 MICH. L. REV. 219, 240 *et seq.* (1955).

highest priority, and many of its vital features are observable by anyone on the premises. Many physical characteristics of guns or machinery may be observable and transmittable by the most inexperienced observer. The mere presence of certain officers may be important. The normal idle lunch-time chatter of employees in such operations may be saturated with comment which may well be inconsequential upon the premises but pregnant with danger outside it. Security regulations for such places are not to be restricted to control of access to copies of papers or limited to the locking of a safe at night. Security regulations in such an installation may well include an impenetrable silence on Factory matters and events, no matter how trivial they may appear to a reviewing court. Denial of employment at a Navy installation because of its security requirements is certainly no more of a stigma than is a discharge for almost any reason. Almost any discharge is a "stigma". But such discharges are not protected by any inherent right to confrontation, cross-examination, etc. The rhetoric in these arguments is greater than their substance.

Third-Party Interference

We come now to another phase of Brawner's case. It is argued to us that in this case the Government (i.e., the Governmental appellees) stands in the position of a third-party tort-feasor; that is, it was guilty of interfering with an employment contract.³⁸ That contract was Brawner's con-

³⁸ The cases stating the law pertinent to this tort are collected in Annots., 29 A.L.R. 532 (1924); 84 A.L.R. 43 (1933), *supplemented*, 26 A.L.R. 2d 1227 (1952); 9 A.L.R. 2d 228 (1950). The law in this area developed from early recognition of a right of action for intentional interference with a man's business, *Garret v. Taylor*, Cro. Jac. 567, 79 Eng. Rep. 485 (1621), to include protection of one's right to a livelihood, e.g., *Truax v. Raich*, 239 U.S. 33 (1915) (involving an employment relationship terminable at will by the parties); *Owen v. Williams*, 322 Mass. 356, 77 N.E. 2d 318 (1948). We must note that the United States as such cannot be liable in damages for "interference with contract rights" (in-

tract (via her representative, the Union) with her employer. In the first place we note this is not the typical case of third-party interference. Admittedly the Governmental action did constitute an "interference" with Brawner's continued employment at a particular situs. The precise question is whether this "interference" was illegal, that is, constituted an actionable wrong. As we have already seen, vis-a-vis his employer, no employee has an inherent right to work at a particular situs. Such a right may under some circumstances exist vis-a-vis a stranger to the employment relationship. But under the law of third-party-interference a defendant is not liable if the alleged interference is no more than the exercise of a legal right equal to or greater than the right claimed by the employee.³⁹ The Government had such a right, namely, the right to exclude people from the Gun Factory Cafeterias; the Government recited this right in Section 5(b) of its contract with M & M Restaurants, Inc. This right was exercised by the Government, through the Governmental appellees, by enforcement of the contract. This right is clearly equal to, or greater than, whatever right

cluding employment contracts) under the Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1958). See *Dupree v. United States*, 264 F.2d 140 (3d Cir.), *cert. denied*, 361 U.S. 823 (1959). In view of our disposition of the case, we need not reach the question whether the appellants are seeking to hold the United States, and not merely the Governmental appellees, liable for such damages.

³⁹ See *Spalding v. Vilas*, 161 U.S. 483 (1896) (Postmaster General held not liable in damages even if he acted maliciously); Annot., 29 A.L.R. 532, 533 (1924). In *Donovan v. T. & P. Ry.*, 64 Tex. 519 (1885), an employee of a freight hauling company lost his position because the railway, by regulation, barred all but railway employees from access to its warehouse. The railway was found not liable, because it had a legal right to adopt such a regulation.

Browner could claim to work at the particular situs. Furthermore, not only did the Governmental appellees exercise a legal right; they performed the legal duty of exercising their discretion under the applicable regulations. We find no liability on the Governmental appellees as third-party tort-feasors.

IV. Liability of M & M Restaurants, Inc.

We next consider the liability of the concessionaire. It is argued to us that the agreement between M & M Restaurants, Inc., and the Union, the latter acting on behalf of all employees, contained a provision that employees should not be discharged without good and sufficient cause. To this there are two answers. In the first place, Browner was not discharged. In the second place, if she had been discharged, surely, so far as her employer was concerned, the refusal of the commanding officer of the Factory to approve her entrance upon the Factory premises was a good and sufficient cause for the employer to release her from employment.

V. *Greene v. McElroy*

Greene v. McElroy, *supra*, is cited to us as controlling. We think it does not treat of our problem. In the first place *Greene* dealt only with the "authorization" relied upon by the Government officers. The Court was quite explicit about this delimitation. We do not have that line of authorization in our case, and the authority dealing with entrance upon naval installations, which we have recited, is clear and ample. In the next place as we have pointed out, *Greene* dealt with a total debarment, in fact even though not technically, from a chosen occupation. The testimony was, as recited in footnote 11 to the Court's opinion: "In view of his [Greene's] position with the company, there was no work which he could do in light of this denial of clearance by the Navy. As a result, it was necessary for the company to discharge him." We

have no such case here. In the concurring opinion in *Joint Anti-Facist Refugee Committee v. McGrath*,⁴⁰ which the Court cites in *Greene*, Mr. Justice Frankfurter emphasizes the historic background of the procedural requirements in different types of proceedings. The Justice said in part:

"The Court has responded to the infinite variety and perplexity of the tasks of government by recognizing that what is unfair in one situation may be fair in another. . . . The precise nature of the interest that has been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed, the protection implicit in the office of the functionary whose conduct is challenged, the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.

" . . . Finally, summary administrative procedure may be sanctioned by history or obvious necessity."⁴¹

We have discussed the historic background of our present problem, the precise nature of the interest affected, and the other factors mentioned in the quoted passage. Nothing in that study suggests a hearing, with witnesses, etc., in respect to employment at a particular place, where the circumstances do not spell total debarment from an occupation.

We hold only that under the circumstances of this case—including the statutes, the regulations, the nature of the place involved, the two contracts, and the arbitration proceeding—no rights of appellant Brawner were violated by the lifting of her identification badge for entrance to

⁴⁰ 341 U.S. 123 (1951).

⁴¹ *Id.* at 163, 168.

the Gun Factory. We have discussed other subjects only because they were pressed upon us by way of argument and must needs be discussed.

The judgment of the District Court is

Affirmed.

DANAHER, *Circuit Judge*, concurring: The dissenting opinion seems to condemn a majority of the court for the decision to rehear the case *en banc*. I am impelled to comment for I had dissented from Judge Edgerton's opinion now annexed to Judge Fahy's present text, as is my original dissent.

It has been fittingly observed that our power to rehear a case *en banc* should be exercised "sparingly," particularly at the instance of one of the parties.¹ "Moderation and self-restraint" control the exercise of our discretion in deciding such motions, but one criterion, at least, involves the effect of an erroneous opinion which may set a precedent for this Circuit.

Our dissenting brothers observe that after appeal in this case had been taken, none of the parties and no member of the division assigned to hear the case and no other member of the court requested that the case be heard *en banc*. Overlooked is the fact that a unanimous division of

¹ It may prove of interest to observe that there have been 72 such motions in the current court year and only 2 have been granted. Our Clerk's records show as to motions for rehearing *en banc* filed by one of the parties: in the court year 1958-1959, 97 such motions were filed and we granted but 1; in the preceding court year, 84 such motions were filed and we granted but 2; in the court year 1956-1957, 48 such motions were filed but we granted none; in 1955-1956, 32 such motions were filed and we granted but 3; in 1954-1955, 35 such motions were filed and we granted none, while in the preceding year we granted but 1 of 21 motions. Thus, of 389 such motions in the last seven court years, only 9 have been granted.

this court had decided our *Greene v. McElroy* on April 17, 1958,² where the situation and the circumstances went far beyond those presented in the instant case. There was no slightest reason for any member of the court or for counsel for the parties to assume what course ultimately might be followed in the *Greene* case.

The Supreme Court granted *certiorari* in *Greene v. McElroy* on October 27, 1958.³ The instant case, before a division of the court differently constituted from that which had heard the *Greene* case, was argued February 19, 1959. The sitting division decided to await the action of the Supreme Court. Neither counsel nor any other member of the court then knew that we had done so, nor could any of us know that the Supreme Court on June 29, 1959 would hand down its decision reversing *Greene v. McElroy*.⁴

Not until August 21, 1959 during summer recess, with most of the judges away, could it publicly be known that a majority of the sitting division had concluded that the instant case was deemed to be controlled by the Supreme Court's decision in *Greene v. McElroy*. When Government counsel saw the opinion of the majority, a motion for rehearing *en banc* was promptly filed.

After our judges had returned for the Fall sessions of the court and had had an opportunity to read the majority opinion with the opposing dissent, and to consider the Government's pending motion, the case was ordered on for argument before the full court on November 9, 1959.

What did the record disclose? A private corporation had had a contract with the United States Government to

² 103 U.S. App. D.C. 87, 254 F.2d 944.

³ 358 U.S. 872.

⁴ 360 U.S. 474. Argument was had on April 1, 1959.

operate a cafeteria in the Naval Gun Factory, owned by the United States. The contractor, M & M Restaurants, Inc., had as one of its employees, Rachel Brawner. As a cook, like other private, non-Government personnel, she was privileged to enter upon the premises of the United States Government only while in possession of a badge of identification, required by naval regulations.

The Board of Governors at the Naval Gun Factory had been notified by the Navy's security officer that Rachel Brawner "would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory *until clearance is certified by the Security Officer.*" (Emphasis added.) Mr. Baker, representing M & M, was requested to return Mrs. Brawner's badge, and he did so. Mr. Baker informed Mrs. Brawner that he had picked up her badge "for security reasons."

The appellant union instituted arbitration proceedings, extensively conducted thereafter. It was then brought out that the union represents 2,000 members who are privately employed by restaurants in Government buildings and 600 members who are commercially employed in cafeterias and restaurants in this area. One of the arbitrators, Samuel H. Jaffe, Esquire, of the firm of Jaffe and Dunau, dissented from the arbitration award. He argued in his dissent against the determination by those in command that Mrs. Brawner did not meet "basic requirements and thus her pass was revoked." He pointed out that there is "no greater threat to the very existence of a labor organization, than to permit an employer the unilateral action it has indulged here." (Emphasis added.) He

Mr. Baker's interpretation may not seem accurate. The notice indicated that Mrs. Brawner had become subject to further check. "Security" could mean many things. Mrs. Brawner might even have been personally insanitary in her food handling and had so become a risk. We have not been told just what prompted the further check on Mrs. Brawner.

further assailed the action of the security officer as "in excess of his authority or under authority not validly conferred. For otherwise no government employee could ever have successfully challenged his ouster from public employment on security grounds: the government could simply answer his protest by saying that the government cannot be required to permit him to work in a building it owns and from which his entry could be barred".

As will be seen from the majority opinion of the sitting division, Judge Edgerton adopted the position urged by Mr. Jaffe. He found the naval officer's order invalid in terms of *Greene v. McElroy* as lacking safeguards of confrontation and cross examination, and "if," he said, "if" Navy regulations purported to justify the order, the regulations "as in the *Greene* case" were likewise similarly deficient. He adopted the analogy offered by Mr. Jaffe that the Government might "deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work." Of course, we were not dealing here with a Government employee. Again, even Government employees in *unprotected* status may be dismissed out of hand. They have protected employment rights only if and when Congress confers such rights.

Thus, as our judges examined the record, it became apparent that there is much more to the problem than at first seems to meet the eye.

Mrs. Brawner's employer M & M, offered her other employment at a different installation operated by it. She refused. That there are scores of privately operated concessions in Government buildings is common knowledge. It is reasonable to assume that private employment as a cook may be available in hundreds upon hundreds of restaurants and cafeterias in the Washington area. This is not a case of "barricading" Mrs. Brawner against employment, as the Supreme Court found had happened to

Greene. But it is a case of the union insisting that it may place and keep one of its members in a *private* employment status in a *particular* place, in a *particular* place on Government property even when Government authorities direct that access be denied "until clearance is certified by the Security Officer."

Never to my knowledge had there been such a challenge to the Government's right to protect its own Navy installation. Throughout our history, the authority of a Navy commandant had not been questioned as he exercised controls over those seeking or claiming the privilege of access to Government property in his charge. I dissented from the majority views. For one thing, I thought the Commandant independently possessed the power he asserted. Again, to the extent that a majority of the sitting division found that the Navy regulations, if relied upon, might have been invalid, I particularly sought to dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for 'confrontation and cross-examination' of sources whose reports may have led to revocation of the privilege of access to the Government's enclave."

I believe a privately employed worker hired by a Government contractor may enter upon Government property only as a matter of privilege which may be accorded or withdrawn as those lawfully charged with responsibility for maintenance of the property may prescribe. I believe no hearing need necessarily be required. To illustrate, I believe confrontation by accusers and a right of cross-examination are not essentials to a valid revocation of "passes" permitting lawyers to use the Supreme Court library, or passes to visitors to the White House, or to employees of public utilities and other contractors servicing Government buildings. It might seem that any of many indiscretions or, specifically a food-handler's personal habits, could prompt such revocation. Even though

a privately employed person has no *authorized* access to a file room in a highly sensitive naval gun factory, if such a person without authorization should be observed in that file room, I think the security officer may order a suspension of the privilege of access pending clearance. I think that officer lawfully might demand that the employer transfer or otherwise deal with the employee without granting confrontation to accusers or a right to cross-examination of them. Even if it were a Government employee in an unprotected status no hearing of any kind whatever would be required.⁶

Since the Government had had no opportunity to present its arguments in the light of Judge Edgerton's application of *Greene v. McElroy*, a majority of the whole court decided to hear this case *en banc*. We have no means of knowing whether the Supreme Court will take a case or not. We do know that, unless reversed, a majority opinion here establishes a precedent for this Circuit. If the views of the two judges were to bind the other seven judges comprising this court here at the seat of government, we would indeed be laying down a new rule of law to control the Government's administration of its property.⁷

So we voted to rehear the case *en banc* and to consider the Government's arguments. Some of the factors distinguishing this case from *Greene* may be summarized:

⁶ See *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Bailey v. Richardson*, 80 U.S. App. D.C. 248, 182 F. 2d 46 (1950), *aff'd* 341 U.S. 918 (1951).

⁷ We, *ourselves*, refused to permit members of a bar association to conduct evening moot court sessions in this courthouse, essentially on grounds of building security. If the privilege had in fact been granted, would we have been precluded from revoking it without a hearing? and charges? and accusers? and confrontation and cross examination?

Here, unlike *Greene*, there was no showing that the cook could not get another position. On the contrary, her own employer offered her another job which she declined.

Here, unlike *Greene*, it was the Government's own weapons producing property which was involved.

Here, unlike *Greene* where neither Congress nor Executive Order had authorized the particular procedure applied in *Greene*, we have the Constitution and the statutes expressly providing for control of military and naval establishments by officers selected for that responsibility. Indeed, Congress has made it a criminal offense for an unauthorized person to trespass upon the property.

Here, unlike *Greene* where an Industrial Security Clearance Program was challenged, we find a mere suspension of privilege of access "until clearance is certified"—and no regulation purported to authorize or to provide a right to a hearing.

Here, unlike *Greene* where a specially trained aeronautical engineer was typical of thousands who would potentially be deprived of private employment and "barricaded" against other work, we must balance the Government's concern in its own protection in terms of excluding possibly undesirable employees of private contractors who may be employable elsewhere.

Finally, a majority of our judges may well have concluded that a majority of the sitting division had read into *Greene* what the Supreme Court said it had read out of it. Rehearing *en banc* was ordered because we believed Judge Edgerton's opinion *might* be erroneous. We all heard and considered the case and now decide that it was erroneous. Judge Fahy would have us reinstate an opinion which most of us believe to be erroneous. I am unable to subscribe to the view that to perpetuate error makes for sound judicial administration.

As I see it, the Supreme Court, the Judicial Conference of the United States and Congress support the position taken by a majority of the court. I think there is great "call for this court *en banc* to overrule the [erroneous] decision of the division" which first heard the case. I quite understand that here had been differing approaches in a circumstance such as this, but I think the Problem has been solved, not only by 28 U.S.C. § 46(c) but by the *Western Pacific Railroad Case*.^{*}

Before the *Western Pacific Railroad Case* was decided, the late Chief Judge Stephens delivered a paper before the District Bar Association, pointing to our practice of furnishing the draft opinion of a sitting division to the other members of the court. He listed cases⁸ where the court

^{*} 345 U.S. 247 (1953); views suggesting those held by Judge Fahy may be noted at page 265. The Supreme Court already had stated otherwise in *Textile Mills Corp. v. Comm'r.*, 314 U.S. 326 (1941). At page 335 Mr. Justice Douglas wrote:

"Conflicts within a circuit will be avoided. Finality of decision in the circuit courts of appeal will be promoted. These considerations are especially important in view of the fact that in our federal judicial system these courts are the courts of last resort in the run of ordinary cases. Such considerations are, of course, not for us to weigh in case Congress has devised a system where the judges of a court are prohibited from sitting *en banc*. But where, as here, the case on the statute is not foreclosed, they aid in tipping the scales in favor of the more practicable interpretation."

And see *Civil Aero. Bd. v. Am. Air Transp.*, 344 U.S. 4, 5 (1952) where the Court told this circuit it "may now wish to hear this case *en banc* to resolve the deadlock indicated in the certificate and give full review to the entire case."

⁸ 20 Journal D.C. B.A. 103, 107, 108 (1953); at that time, 1953-1954, the Chief Judge made up the sitting divisions, assigning judges whose recognized differing viewpoints might be balanced in the consideration of each case. But since this court thereafter inaugurated the plan of choosing judges by lot, combinations of two particular judges holding similar "policy" views may occur with greater or less frequency, depending upon the dates they select

had sat *en banc* after Congress had adopted 28 U.S.C. § 46(c), tracing recognition of its power to do so back to *Tertile Mills Corp. v. Comm'r.*, *supra* note 8.¹⁰

In the Conference of Senior Circuit Judges meeting on October 1, 1938, with Chief Justice Hughes presiding, Judge Stone of the Eighth Circuit brought up the question "of determining how many judges will sit in a given case." The Chief Justice asked: "... would it meet your point if the statute provided that the court shall consist of three judges unless in the opinion of the majority of circuit judges a larger court or a court of a greater number of judges at any time shall be deemed desirable?"¹¹ Following discussion, Judge Wilbur moved and the Conference adopted in substance, the proposal that Congress be asked to legislate that a majority of the circuit judges might provide for a court of more than three judges when in their opinion unusual circumstances make such action advisable. The Conference so recommended, in 1938 and each successive year, until in 1941, the House

for their arguments. Situations have arisen where a majority of the court has found itself at odds with particular opinions in cases as to which *sua sponte*, the full court has sometimes ordered rehearings *en banc*. See footnote 10.

¹⁰ The following tabulation, relevant to footnote 9, discloses that the court has *sua sponte* ordered rehearings *en banc* as follows:

	Motions	Granted
1953-1954	1	1
1954-1955	9	5
1955-1956	4	4
1956-1957	8	8
1957-1958	13	8
1958-1959	4	4
1959-1960	7	1

¹¹ Minutes of the Conference, p. 360.

adopted H.R. 3390. Its report No. 1246¹² drew upon a letter from Judge Biggs dated February 14, 1941, reporting the recommendation of the Judicial Conference that Congress act favorably on the measure. Judge Biggs noted that the Conference deemed it advisable that all the active and available judges of the circuit should be included "to avoid any ground for suspicion that particular judges of the court, more than three but less than all, were selected to bring about a particular decision."¹³ He added: "It was to avoid the determination of decisions by a minority of judges, although in the utmost good faith, that did not represent the judgment of the court as a whole, that the measure was recommended by the Judicial Conference . . ."

The Senate in 1941 had before it S. 1053, the counterpart of the House measure. The Judicial Conference in special session in January, 1941, had recommended its passage. Administrator Chandler at the April hearings presented the favorable views of the Judicial Conference, quoting, in part, from a letter reflecting the Conference position:

"Many cases are of a highly controversial nature and permit, not unreasonably, diverse views of the law. We think that if there be a controversial case a majority of the court should not be bound by a decision of two members, particularly if the other members of the court are plainly of the opinion that

¹² See footnote 14, *Textile Mills Corp. v. Comm'r.*, 314 U.S. at 334-35. The Committee report deemed *en banc* consideration desirable. "It also will obviate the situation where there are seven members of the court and as sometimes happens a decision of two judges, (there having been a dissent) sets the precedent for the remaining judges."

¹³ Letter on file, Administrative Office of United States Courts. Congress by the Act of August 3, 1949, 63 STAT. 493, added three judges to this court. Three of our Circuit Judges received recess appointments on October 21, 1949.

the question is of such importance that they desire to have their say in regard to what they think the law is."¹⁴

Such was the background as reported by the senior circuit judges themselves for the ultimate adoption of 28 U.S.C. § 46(c). Congress cautiously examined the problem for many years in the light of Judicial Conference recommendations and Supreme Court pronouncements before codifying section 46(c).¹⁵

Of course we may—and most often do—decide not to resort to section 46(c). We may even refuse to do so altogether. We may then attempt to certify unresolved

¹⁴ *Hearings Before the Subcommittee of the Senate Committee on the Judiciary*, 77th Cong., 1st Sess., re S. 1053, pp. 15-16 (1941). Additional legislative history may be found in *Western Pacific Railroad Case*, *supra* note 8, particularly at 254, and footnotes 8 *et seq.*; and see *En Banc Proceedings in the United Courts of Appeals*, 22 GEO. WASH. L. REV. 482 (1954).

¹⁵ *Western Pacific Railroad Case*, *supra* note 8, at 253, 254; and see *Hearing and Rethinking Cases In Banc*, 14 F.R.D. 91, 96-97 where Judge Maris wrote:

"A decision of a controversial question made by a majority of all the judges of the court in banc obviously has much greater authority than a decision by two concurring judges of a panel of three which all the other five judges of the court might consider quite erroneous. True such matters could be corrected by the Supreme Court on certiorari but that court should not have to resolve conflicts of decision within a single court. The procedure in banc enables the court itself to deal authoritatively with problems of this nature, thus relieving the burden of the Supreme Court. The Circuit Judges of the Third Circuit think that this procedure has been very helpful in maintaining the very high esprit de corps which they enjoy. For each of them knows that in any case in which they are seriously divided in opinion they will all have an opportunity to participate in the ultimate decision which the court is to make and which under the doctrine of stare decisis is to be binding upon them in future cases."

questions to the Supreme Court, but we may find them dismissed.¹⁶ We may let successive divisions develop a conflict within the circuit. Is that result to be desired? I reject any such course, and believe we should earnestly attempt to decide and thus to settle our own differences—by majority action of the whole court. And that is precisely what the Supreme Court has told us to do.

“[A]ll but two Circuits have more than three Circuit Judges. This undoubtedly raises problems when one panel has doubts about a previous decision by another panel of the same court. . . . It is primarily the task of a Court of Appeals to reconcile its internal difficulties.”¹⁷

Rehearings *en banc* pursuant to section 46(c) in most cases have achieved definitive disposition of controversial and decisive differences. I do not regard as wasted the time so spent, particularly when we look back upon the multiple conferences and the often futile exchanges of memoranda as we *otherwise* have sought agreement. Reconciliation of deeply held views has sometimes presented an imponderable problem in courts other than ours. A determination here by *en banc* rehearing and decision seems to me a highly salutary course. In that spirit we approached this very case.

The dissenters here would “reinstate” the opinion of the sitting division. A majority of the whole court, all nine judges voting, deem it erroneous. We thus assert and exert the authority conferred by 28 U.S.C. § 46(c) precisely in furtherance of one of important purposes of the legislation as recommended by the Judicial Conference

¹⁶ See, e.g., *In re Burwell*, 350 U.S. 521 (1956), where the Court at 522 hinted at its *Western Pacific* case, as pointing a route to decision; and *Civil Aero. Bd. v. Am. Air Transp.*, *supra* note 8.

¹⁷ *Wisniewski v. United States*, 353 U.S. 904-02 (1957), and cases cited. And see, e.g., *Starr v. United States*, 105 U.S. App. D.C. 91, 264 F. 2d 377 (1958), *cert. denied*, 359 U.S. 936 (1959); *Brown v. United States*, 105 U.S. App. D.C. 77, 264 F. 2d 363, *cert. denied*, 360 U.S. 911 (1959).

and as recognized by Congress.¹⁸ We have acted under "a grant of power to order hearings and rehearings *en banc* and to establish the procedure governing the exercise of that power,"¹⁹ as the Supreme Court recognized.

In that view condemnation of the present majority by two of our colleagues may seem inappropos. I concur in the opinion by Chief Judge Prettyman.

I am authorized to state that Chief Judge Prettyman and Circuit Judges Wilbur K. Miller, Bastian and Burger concur in my opinion.

FAHY, *Circuit Judge*, with whom EDGERTON, *Circuit Judge*, joins, *dissenting*: In my opinion, while according due respect to those of a contrary view, rehearing this case *en banc*, a matter for the exercise of the sound discretion of the full membership of the court, should not have been granted after the decision of the division. The statutory structure of this court of nine members, any three of whom constitute a court, is designed to enable us to keep abreast of our work as it increases in volume over the years. Though I do not question our power to rehear any case *en banc* it is a power to be exercised sparingly and only for good cause.¹

Appellant Rachel M. Brawner, the private individual concerned, and the appellant labor organization of which she was a member, brought an action in the District Court on September 6, 1957, claiming that she had been illegally deprived by the Government, on security grounds, of her private employment as a cook in a cafeteria which was

¹⁸ It is reasonable to suppose the Supreme Court will agree. It has told us "Our [its] general power to supervise the administration of justice in the federal courts . . . does not extend to disregarding a validly enacted and applicable statute or permitting departure from it" *United States v. Nat. City Lines*, 334 U.S. 573, 589 (1948).

¹⁹ *Western Pacific Railroad Case*, *supra* note 8, 345 U.S. at 267.

¹ The late Chief Judge Stephens stated his views upon the subject some years ago for the information of the Bar. 20 D. C. Bar Ass'n Jour. 105-09 (1953).

located with Government approval in the Naval Gun Factory. The District Court decided against her on July 21, 1958. She and the Union appealed to this court on August 14, 1958. Neither the appellants, nor the United States, nor any member of the division of this court assigned to hear the case, nor any other member of this court, requested that the case be heard en banc. The division accordingly heard argument and took the case under advisement, in February 1959. There was then pending in the Supreme Court *Greene v. McElroy*, 360 U.S. 474. That case also involved the discharge, demanded by the Government on security grounds, of a person in private employment. Mr. Greene was an employee of a company manufacturing products for the Defense Department. He was authorized to have access to classified information, which our appellant was not. The division which heard the present appeal awaited the decision of the Supreme Court in *Greene v. McElroy*, which came down June 29, 1959. Reversing this court, the Supreme Court held that Mr. Greene's deprivation of employment was unauthorized.

Neither the United States, nor appellants, nor any of the nine members of this court, then sought reargument of appellants' case, en banc or otherwise. On August 21, 1959, the division which had heard this case decided it, holding, especially in light of *Greene v. McElroy*, that appellant Brawner's discharge had not been validly accomplished, one judge dissenting. Five weeks later, on September 25, 1959, rehearing en banc was sought for the first time, by the United States, in order to obtain a reversal of our decision, thus using the full court of nine judges as a court of appeals over a division.

When the division decided the case it became ripe for consideration by the Supreme Court. When the United States nevertheless requested a rehearing en banc, each of the nine members of this court was called upon to consider the appropriate course for the litigation to take.

Five members voted at this late stage to rehear the case en banc. It was accordingly set down for reargument, and reargued. It has now been re-decided, the earlier two to one decision of the division being reversed by a vote of five to four. Many months and much judicial and professional labor have been consumed in the en banc process, with final termination of the litigation still uncertain and probably far removed. A decision is rendered which four of us think clearly inconsistent with principles laid down by the Supreme Court in recently reversing this court in *Greene v. McElroy*. Appellant Brawner—unless she has wearied of the matter—will no doubt seek Supreme Court review. In that event the Supreme Court will be faced, as it could quite well have been faced many months ago when the decision of the division was rendered, with the question whether or not to review the case. There was no call for this court en banc to review the decision of the division because, by reason of the nature of our court and of this case, the responsibility of decision at the level of this court had been fully met. It seems to me that in such a case as this the possibility of a different result should then have been left, as it is now much later left, to the Supreme Court. Even if the decision of the division be doubtful nothing has been advanced, and everything has been retarded, for both the individual and the Government, by the substitution nearly eight months later of a decision no less doubtful.

Were the case of only local importance, and therefore one in which a decision deemed by a majority of the full court to be erroneous must be corrected if at all by the court en banc, because not worthy of presentation to the Supreme Court, then our court en banc might perhaps have been more warranted in intervening. *Larkin v. United States*, — U.S. App. D.C. —, — F. 2d —, is illustrative. But even in such a case moderation and self-restraint would be in order, for the philosophy underlying the structure of this appellate court does not con-

template ordinarily a superior appellate court within the court itself. Moreover, had request for en banc hearing of this case been made before the division heard it, or even before the division decided it, such a hearing might reasonably have been granted because of the obvious importance of the case. But en banc intervention after the decision of the division has served merely to retard ultimate disposition of the litigation, with no countervailing advantage to either the public or the private interests involved.

My views thus expressed are not in condemnation of my brethren of the majority, but only an expression of opinion, different from theirs, as to the use of the en banc power.

I would vacate the order granting the rehearing en banc and would reinstate the opinion and judgment of this court first filed.

I add that deprivation of employment on security grounds is a grave injury. The public draws no sharp distinction between security and loyalty. Cf. *Vitarelli v. Seaton*, 359 U.S. 535. As the Supreme Court has said of exclusion from public employment on disloyalty grounds, "In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy." *Wieman v. Updegraff*, 344 U.S. 183, 191. Engineer and cook alike suffer, in spirit and in reputation. They should have equal protection.

The opinion of this court first filed, and the dissenting opinion filed at the same time, were as follows:

Before EDGERTON, FAHY, and DANAHER, *Circuit Judges*.

EDGERTON, *Circuit Judge*: A private corporation, M & M Restaurants, Inc., under a contract with government officers, operated a cafeteria in the Naval Gun Factory, property of the United States. The corporation employed appellant Brawner, a civilian,

as a cook. Without a hearing of any sort, the Superintendent and the Security Officer of the Naval Gun Factory excluded her from the premises and thereby deprived her of her job. They said she did not meet the "security requirements". No one told either her or the corporation which employed her what the security requirements were, or why she was believed not to meet them. The employer asked for "a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner." The request was refused.

Brawner and her labor union sued the Secretary of Defense, the Secretary of the Navy, the Superintendent and the Security Officer of the Gun Factory, and also Brawner's employer, for the loss of her job, and have appealed from a summary judgment dismissing the complaint.

Except with respect to the employer, the District Court erred. This has now become clear. On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds, "in a proceeding in which he was not afforded the safeguards of confrontations and cross-examination." *Greene v. McElroy*, 360 U.S. 474. What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

It is immaterial that Greene's working place does not appear to have been, as Brawner's was, on government property. From the premise that "the United States could validly exclude all persons from access to the Naval Gun Factory", appellees draw the conclusion that the Secretary of Defense could validly exclude Brawner from her work there, on "security" grounds, without giving her a hearing. If the conclusion followed from the premise, it would

likewise follow that the Secretary could deprive government employees of their jobs on similar grounds, without giving them a hearing, by simply excluding them from the places where they work. But neither Congress nor the President has authorized any such thing. And it is clear that government officials may not deprive government employees of their jobs on security grounds except as authorized by Congress or the president. *Peters v. Hobby*, 349 U.S. 331; *Cole v. Young*, 351 U.S. 536.

The government challenges the standing of appellant labor union to sue. We think the union here had standing to protect the interests of its members.¹ Cf. *Nat'l Ass'n for the Advancement of Colored People v. Alabama*, 357 U.S. 449, 459-460; *MacArthur Liquors, Inc. v. Palisades Citizen Ass'n*, 105 U.S. App. D.C. 180, 265 F. 2d 372.

Since Brawner's employer could not employ her within the Naval Gun Factory, the only place where it had contracted to employ her, when the government appellees would not let her enter the place, it is not responsible for ceasing to employ her.¹ Appellants' claim against the employer is for alleged breach of contract, and impossibility of performance defeats the claim. The judgment in favor of M & M Restaurants, Inc., is therefore affirmed. The judgment in favor of the government appellees is reversed and the case is remanded to the District Court for proceedings consistent herewith.

So ordered.

¹ The union was the recognized representative of the employees of M & M Restaurants, Inc., under a collective bargaining agreement between the union and the Restaurants. The agreement authorized the union to participate in any dispute arising thereunder, including a dispute over discharge of any employee. When Implant Foods, Inc., replaced the Restaurants as the operator of the cafeteria, the new collective bargaining contract included a provision whereby Implant agreed to reinstate appellant with full rights should this suit be determined in her favor. Cf. *Fishgold v. Sullivan Corp.*, 328 U.S. 275, 283.

DANAHER, *Circuit Judge*: I concur specifically in the majority's opinion affirming the judgment in favor of M & M Restaurants, Inc. Otherwise I dissent.

To say that some officials may have abused their authority is not to deny that authority exists. This is not such a situation as was presented in *Greene v. McElroy*, 360 U.S. 474. The property here is owned by the Government and is part of the naval establishment. Control of access to the Naval Gun Factory has legally been vested in the Superintendent. When the public may enter and for what purposes and under what circumstances may be determined by that officer, in accordance with governing regulations. Congress has even made it a criminal offense, under some circumstances, for unauthorized personnel to be upon the premises. 18 U.S.C. § 1382 (1952).

The basic principle of control by the Government of its own naval establishment is here paramount, I think. Truck drivers, plumbers, telephone operators, electricians, artisans in every walk of life, in one way or other and at one time or other may have legitimate business with a naval base, but the privilege of access is to be extended and may be continued only as those charged with maintaining the security of the Government's operation may by regulation prescribe. If some petty thief or numbers player or narcotics peddler or otherwise unfit person should insist upon continuance of a previously extended privilege of access, I think the regulations authorize the Superintendent to bar him.

I am unable to conclude that regulations under which the officials here acted were invalid or unauthorized. Particularly do I dissociate myself from the suggestion that invalidity implicitly turns upon whether, in application, provision has been made for "confrontation and cross-examination" of sources whose reports may have led to revocation of the privilege of access to the Government's enclave.

BAZELON and WASHINGTON, *Circuit Judges, dissenting*:
We agree with Judges Edgerton and Fahy that the case
must be reversed on the authority of *Greene v. McElroy*.
We note also that we joined them in voting against rehear-
ing en banc.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, *et al.*, APPELLANTS

v.

NEIL H. McELROY, Individually, and as Secretary of
Defense, *et al.*, APPELLEES

Appeal from the United States District Court
for the District of Columbia

Decided August 21, 1959

Mr. Bernard Dunau for appellant.

Mr. DeWitt White, Attorney, Department of Justice, of
the bar of the Supreme Court of West Virginia, *pro hac*
vice, by special leave of court, with whom *Messrs. Leo J.*
Michaloski, Jerome L. Avedon, and Justin R. Rockwell,
Attorneys, Department of Justice, were on the brief, for
appellees.

Before EDGERTON, FAHY, and DANAHER, *Circuit Judges*.

EDGERTON, *Circuit Judge*: [This opinion appears *supra*, pp. 38a-40a.]

FAHY, *Circuit Judge, concurring*: I have concurred in Judge Edgerton's opinion, but in view of the dissenting portion of Judge Danaher's opinion I add these words of my own.

As has been pointed out, appellant Brawner was a privately employed cook in the cafeteria, conducted with Government agreement by M & M Restaurants, Inc., on the premises of the Naval Gun Factory. None of the papers before us indicates that she had access to classified information or to any restricted part of the Naval Gun Factory which posed a security problem over and above that affecting her as a cook in the cafeteria. Under settled law, recently expounded by the Supreme Court in *Greene v. McElroy*, 360 U.S. 474, the right to hold specific private employment comes within the "property" protected by the Due Process Clause of the Fifth Amendment against unreasonable governmental interference. The question before us, therefore, is not whether the Government can control access to the Naval Gun Factory, which of course it can do, but whether the control it exercised in this instance, which caused the loss of the cook's employment in the cafeteria, conformed with the requirements of the Due Process Clause. The location of the employment is a relevant circumstance on the issue of due process of law, but does not dispense with the issue. Since we are a government of law, and I can find no authority in any law, Executive Order or regulation which authorized the deprivation of this cook's employment in the manner in which it occurred, for that reason alone I think the deprivation was invalid, as in *Greene*.

Appellant Brawner was not a visitor or a tradesman or tradesman's agent within the meaning of the regulations controlling the access of these persons to the premises. She was not an employee of the Navy, and so was accorded none of the benefits of the clearance regulations applicable

to such an employee in security matters. She was simply deprived of her employment out of hand, without notice, hearing, opportunity to be heard, or statement of reason except that she did not meet "security requirements." Even were this authorized by some law or competent authority I do not see how it could be squared with due process of law. Due process of law requires a reasonable procedure; and to be reasonable a procedure must be such as reason is able to appraise in all the circumstances as fair; and in order for reason to do that I think the procedure must at least in the circumstances before us disclose to the person affected enough of the basis for the action to enable her to test its truth, with an opportunity in some manner to do so.

We do not decide that confrontation and right of cross-examination were essential, the question reserved by the Supreme Court in *Greene*, for here as there that question is not reached because in any event the manner of deprivation of employment was unauthorized and in this case was otherwise unreasonable as well. Since it was unauthorized and unreasonable due process of law was lacking in both respects.

We are not concerned with truck drivers and others mentioned by my brother Danaher; none of these complains of having been deprived of his employment by government action. If any were to do so, we might have a question like the one we do have. Finally, I do not understand the relevance of the reference in the dissenting opinion to the authority of the Superintendent to bar a petty thief or a numbers player or a narcotic peddler, or other unfit person. But when any deprivation of liberty or property does involve such as these the courts do not withhold from them the application of the Due Process Clause. The Fifth Amendment provides that "No person shall be . . . deprived of life, liberty or property without due process of law."

DANAHER, *Circuit Judge*: [This opinion appears *supra*, p. 41a.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14689

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL 473,
AFL-CIO, et al., APPELLANTS,

v.

NEIL H. McELROY, Individually and as Secretary of
Defense, et al., APPELLEES.

Appeal from the United States District Court
for the District of Columbia

Before: PRETTYMAN, Chief Judge, and EDGERTON, WILBUR
K. MILLER, BAZELON, FAHY, WASHINGTON, DANAHER, BAS-
TIAN and BURGER, Circuit Judges, sitting en banc.

Judgment

THIS CAUSE came on to be reheard en banc on the record
on appeal from the United States District Court for the
District of Columbia and was reargued by counsel.

ON CONSIDERATION WHEREOF It is ordered and adjudged
by this Court that the judgment of the District Court
appealed from in this cause be, and it is hereby, affirmed.

Per Chief Judge Prettyman.

Dated: April 14, 1960.

Separate concurring opinion by Circuit Judge Danaher.

Separate dissenting opinion by Circuit Judge Fahy, with
whom Circuit Judge Edgerton joins.

Separate dissenting opinion by Circuit Judges Bazelon
and Washington.

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Office Supreme Court, U.S.

FILED

JUN 23 1960

JAMES E. BROWNING, Clerk

No. 256 97

In the Supreme Court of the United States

OCTOBER TERM, 1959

**CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAWNER,
PETITIONERS**

v.

NEIL H. McELROY, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT**

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 953

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAUNER,
PETITIONERS

v.

NEIL H. McELROY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA
CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (R. 132)¹ is not reported. The opinion of the court of appeals *en banc* (Pet. App. 1a-42a) is not yet reported.²

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1960 (Pet. 45a). The petition for a writ of certiorari was filed on May 24, 1960. The juris-

¹ "R." refers to the Joint Appendix in the court of appeals which has been filed in this Court.

² After the decision of the Court of Appeals was entered, respondent Gates was substituted for respondent McElroy in the capacity of Secretary of Defense. Respondents thereupon moved on May 3, 1960 in the Court of Appeals for dismissal of the case

diction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the commander of a military installation has authority to prohibit, summarily and without a hearing, entrance of persons employed by private contractors into the installation.

2. Whether the exercise of such authority in the circumstances of this case violated the Fifth Amendment to the Constitution.

STATEMENT

Petitioner Rachel M. Brawner was employed as a short-order cook by the M & M Restaurants, Inc., a private company (hereafter called the "Concessionaire") at a cafeteria on the premises of the United States Naval Gun Factory in Washington, D.C., which is engaged in the development of weapons systems of a highly classified nature (R. 4, 39, 90, 93, 107). The property on which the cafeteria was situated is owned by the United States (R. 105) and is under the command of the Superintendent of the Naval Gun Factory (R. 105; Exhibits C and D, R. 108-112). Access to the Gun Factory is restricted to authorized personnel and is controlled by military guards at all points of access. An identification badge as to Mr. McElroy in his individual capacity. See fn. 4, *in/ra*, p. 6. This motion was granted on June 2, 1960, but because of defective service respondents filed a motion in the Court of Appeals to reconsider and reaffirm the court's order dismissing as to Mr. McElroy in his individual capacity. Petitioners then cross-moved to vacate the order of June 2, suggesting lack of jurisdiction since a petition for certiorari had been filed in this Court. Respondents have filed an opposition to this cross-motion. No further action has yet been taken by the Court of Appeals.

is issued by the Security Officer of the Gun Factory to persons authorized to enter the premises and must be displayed by those seeking entry (R. 7, 90, 94).

The cafeteria was operated by the Concessionaire under a contract with the Board of Governors of the United States Naval Gun Factory Cafeterias (R. 5-6). Under this contract the Concessionaire agreed that it would not continue to engage personnel who "fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity" (R. 5-6). The personnel employed by the Concessionaire were members of the petitioner union, Cafeteria and Restaurant Workers Union, Local 473, AFL-CIO, with whom the Concessionaire had a collective bargaining agreement containing a provision that no worker should be discharged "without good and sufficient cause" and also providing for arbitration proceedings to resolve any disputes arising under the contract (R. 18-20).

When petitioner Brawner began working for the Concessionaire, she was issued an identification badge which permitted her to enter and leave the confines of the Gun Factory. On November 15, 1956, at the direction of respondent Lieutenant Commander Williams, the Security Officer of the Gun Factory, petitioner Brawner was required to relinquish her identification badge because of failure to meet the security requirements of the installation (R. 98-99). This action was subsequently upheld by respondent Tyree, Superintendent of the Naval Gun Factory (R. 59-60). As the basis of his action, Tyree cited the provision in the contract, entered into between the

naval officials and the Concessionaire, that the Concessionaire could employ only personnel who met the security requirements for admittance into the Factory as determined by the Security Officer (Exhibit N, R. 32-33). As a consequence of the withdrawal of her identification badge, petitioner Brawner has not since been permitted access to the premises where the cafeteria is located.

Shortly after the termination of Mrs. Brawner's access to the Gun Factory, Denver E. McKaye, president of the Concessionaire, notified the Business Agent of the Union that his firm would employ petitioner Brawner at another location where his firm operated a food service establishment, i.e., the Skylark Motel, Springfield, Virginia (R. 131). Mr. Palmer, the Union Business Agent, told Mr. McKaye that the location of this alternate employment was unsatisfactory and therefore refused the offer for petitioner Brawner (R. 131). The Union took the position that the Concessionaire had discharged petitioner Brawner "without good and sufficient cause" and thereby had violated the collective bargaining agreement between the Concessionaire and the Union (R. 8-9, 20-23, 45-48, 91). Accordingly, the Union demanded arbitration proceedings under the contract. An arbitration hearing was held, and on August 6, 1957, the arbitration panel held that petitioner Brawner was not discharged by the Concessionaire. The panel further held that if she was discharged it was not the fault of the Concessionaire, but was the result of the government's action in denying access to the place of employment which made it impossible

for the employer to perform his contract with the Union (R. 71, 76).

On September 6, 1957, the petitioners instituted suit in the District Court for the District of Columbia seeking (1) to require the respondents³ to furnish petitioner Brawner with an identification badge authorizing her entry upon the premises of the Naval Gun Factory and approval of her reemployment there by the Concessionaire; (2) to require the Concessionaire to reinstate her with all seniority rights, and to pay all loss of salary since November 15, 1956, with interest at 6% per annum; (3) to hold the respondents and the Concessionaire jointly and severally liable as individuals for loss of pay since November 15, 1956, with interest at 6% per annum; and (4) to set aside the arbitration award of August 6, 1957 (R. 16-17). After a hearing, the district court denied the plaintiffs' motion for summary judgment, granted the defendants' cross-motion for summary judgment, and dismissed the complaint as to all the defendants (R. 132). A three-judge division of the court of appeals, in a divided decision, affirmed the judgment in favor of the Concessionaire, but reversed the judgment as to the respondents here and remanded the case. On rehearing *en banc*, the full Court of Appeals held the decision of the three-judge panel erroneous and affirmed the judgment of the district court.

³ Besides Tyree and Williams, the other respondents are Neil H. McElroy, the former Secretary of Defense, and Thomas S. Gates, the present Secretary of Defense. The Concessionaire was named as a defendant in the complaint but the district court dismissed the action as to it and the court of appeals affirmed. Petitioners do not seek review of these rulings, and the Concessionaire is not a respondent in this Court.

The contract under which the Concessionaire operated the cafeteria where petitioner Brawner was employed expired on January 31, 1958, and the Concessionaire no longer operates any cafeteria on the premises of the Gun Factory. The new concessionaire, Implant Foods, Inc., has entered into a collective bargaining contract with the Union whereby Implant has agreed to employ petitioner Brawner with full rights if this litigation is decided in her favor (Pet. App. 40a).

ARGUMENT

Petitioner Brawner, an employee of a private company with a contract to operate on a military base, was summarily denied access to the base by action of the military commander. Petitioners seek a judicial order requiring the respondent government officials to return Mrs. Brawner's identification badge and thereby allow her access to the military installation.⁴ The considered ruling of the court below adverse to their claims is correct, and there is no need for review by this Court.

1. Petitioners' principal contention is that the decision of the court of appeals upholding the action of the military commander is in conflict with *Greene v.*

⁴ Petitioners' additional claim for relief against the respondent government officers—that they be held jointly and severally liable for loss of pay—is plainly frivolous. Their action, whether or not authorized, was clearly taken in the performance of their official duties. It was therefore absolutely privileged from civil liability. See, e.g., *Barr v. Matteo*, 360 U.S. 564; *Howard v. Lyons*, 360 U.S. 593; *Gregoire v. Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. The other relief sought by petitioners in their complaint is directed to petitioner Brawner's employer, which is not a party in this Court.

McElroy, 360 U.S. 474, in which this Court held that "in the absence of explicit authorization from either the President or Congress the respondents [in that case] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). The petition reasons that Mrs. Brawner was likewise deprived of her job with a private employer without confrontation and cross-examination—without even any hearing at all—and that such a procedure was not explicitly authorized. We submit, however, that while the *Greene* case may appear on the surface to involve an analogous situation, it is in fact premised on factors which are not present in the instant case. Moreover, even if the *Greene* principle is thought applicable, the relevant statutes and regulations, coupled with the long history of plenary control by military commanders over access to military installations through summary decisions, constitute the clear authorization which would be required.

a. The decision of this Court in *Greene* was founded on three basic propositions, none of which is involved in this case.

(i). First, in *Greene*, the evidence was uncontradicted that the employee had lost his job as a result of the revocation of his security clearance and that he was unable to obtain a new position in the aeronautics field. Thus, he was forced to leave a job paying \$18,000 per year and to accept a position paying \$4,700. In the light of these facts, the Court stated that "the issue, as we see it, is whether the Depart-

ment of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions * * * in proceedings in which confrontation and cross-examinations are not guaranteed. 360 U.S. at 493. Similarly, the opinion later describes the situation before the Court as "Governmental action [which] seriously injures an individual * * * (*id.* at 496), "an industrial security program which can operate to injure individuals substantially by denying to them the opportunity to follow chosen private professions * * * (*id.* at 500), "security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions * * * (*id.* at 502), "programs under which persons may be seriously restrained in their employment opportunities * * * (*id.* at 502-503), "substantial restraints on employment opportunities of numerous persons * * * (*id.* at 506), and a program by which "a person may be deprived of the right to follow his chosen profession" (*id.* at 507). And, in concluding, the Court reiterated that "the petitioner's work opportunities have been severely limited * * *" and that "respondents were not empowered to deprive petitioner of his job * * *" (*id.* at 508). In sum, the Court relied heavily on the important interest of employees such as Greene in earning a satisfactory livelihood.

The situation in Mrs. Brawner's case is quite different. In the first place, since the M & M company no longer has a contract to operate a cafeteria at the

Gun Factory, the present posture of the case is that the return of Mrs. Brawner's badge could not possibly restore her job with M & M.⁵ While petitioner Union has a collective bargaining agreement with the new concessionaire to hire her if her badge is returned, she is in effect now in the position of a person seeking access to the base in order to assume *new* employment. In other words, as the case comes before this Court, Mrs. Brawner, far from seeking access to the base in order to protect an old job, is attempting to secure new employment with a new employer.⁶

Even if the case is considered in its posture before the district court, Mrs. Brawner cannot claim that her relationship with her employer was entirely severed, let alone that she was denied all employment in her chosen occupation. She was told by the Concessionaire that she could no longer work at the particular

⁵The present relationship of the M & M company to the Gun Factory is important because the main relief requested by petitioners is the restoration of Mrs. Brawner's badge (as an employee of the company) at the Gun Factory. That relief is necessarily prospective.

⁶Recent events also suggest that this case, as it relates to restoration of Mrs. Brawner's badge, may soon be moot, or, at least, of greatly diminished importance insofar as Mrs. Brawner is concerned. The Defense Department has announced that the Gun Factory will no longer operate as an industrial plant (although it will remain a naval installation); thereby causing a gradual reduction in the civilians employed from 5970 at present to 2300 in January 1962. The number of workers in the cafeteria will be reduced proportionally as employees in the Gun Factory are discharged. Thus it is contemplated that by January 1962 over one quarter of the cafeteria workers will no longer be needed. Since it is estimated that Mrs. Brawner is among the lower quarter of the cafeteria's employees in seniority, she would presumably lose her position at the Gun Factory in the near future even if a badge were given her.

cafeteria in the Gun Factory, but she was also offered employment in another cafeteria operated by her employer not too many miles away. The denial of access to Mrs. Brawner meant, in reality, a transfer of positions within the same company and not necessarily the loss of all employment.³ Her refusal to accept the transfer because of inconvenience does not measure up to the drastic interference with employment, and employment opportunities, involved in *Greene*. In addition, it is significant that Mrs. Brawner, unlike Greene, was in an occupation in which few positions involve government clearance of any kind. She was not deprived generally of her right to employment, as the Court held Greene to have been.

Turning from petitioner Brawner in particular to the problem as a whole, it is evident that there is substantially less likelihood of a serious impact on employment opportunities through loss of access to military installations. The number of civilians employed on military bases by private contractors, while large, is a negligible proportion both of total employment and of employment in the particular occupations involved. The large majority of such persons are in non-specialized service occupations⁴—laundrymen,

³ Compare the concurring opinion of Mr. Justice Douglas in *Peters v. Hobby*, 349 U.S. 331, 352: "If the sources of information need protection, they should be kept secret." This statement implies that a government employee could be transferred, so that he could not see classified information, in circumstances where the information could not be used to discharge him.

⁴ The major exceptions are employees who, unlike petitioner, have access to classified information. They, however, generally come within the Industrial Security Program to which the *Greene* case applied (see Pet. 15).

milk truck drivers, cafeteria workers, and the like—as to which most employment within the United States is totally unconnected with the government. Thus, even when denial of access to a military base actually results in an employee's loss of his job, it is unlikely to result in barring him, as in *Greene*, from his occupation as a whole.

(ii). The second fundamental premise of the *Greene* decision is that, under the Industrial Security Program, clearance is denied only on the basis of a fact determination reached through elaborate hearing and appeal procedures. The Court stated that it is a general principle of American jurisprudence that “where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue.” 360 U.S. at 496 (emphasis added); see also *id.* at 495, 508. Thus, the Court concluded that the requirement of fact findings assumes that the usual incidents and protections of American law will be afforded in reaching these findings, unless there is explicit provision to the contrary.

Military commanders have throughout our history summarily controlled access to military installations. See, e.g., 26 Op. Atty. Gen. 91, 92 (1906).^{*} This has not been done on the basis of “fact findings” or,

^{*}In fact, the Army Judge Advocates General repeatedly held that the Secretary of War lacked even the authority to allow use of military lands by private citizens unless the use was revocable at will. See Winthrop, *Digest of Opinions of the Judge Advocates General of the Army* (1895), 625-626.

normally, of a hearing-type or trial-type of procedure. Military commanders have made their decisions simply on the basis of whatever information they had or could obtain. Since these decisions have not been based on a "fact finding" in any real sense, there is no ground for assuming here—as in *Greene*—that the normal procedural concomitants of factual findings must be accorded the individual adversely affected (in the absence of clear authorization by the President or Congress of a different procedure).

(iii). Another critical distinction between this case and *Greene* is that here no serious constitutional issue is involved. It is clear that the ruling in *Greene* rests in considerable measure on the conclusion that the "administrative action has raised serious constitutional problems" and that for this reason the Court will not lightly assume that the action was authorized. 360 U.S. at 507; see also *id.* at 492, 497, 508. In contrast, as we indicate below (pp. 13-17), the long history of summary control over civilian access to military bases makes clear that petitioners have no constitutional right to a trial-type adjudication before access is denied. Civilians have been, and can validly be, excluded from military posts without any hearing or trial—and for a large and varied number of reasons. But even if a serious constitutional issue were involved here, we do not believe that this fact alone, in the absence of at least the other two underlying premises of the *Greene* decision we have discussed, would be enough to bring this case close to *Greene*.

b. In short, there do not exist in this case basic factors upon which the Court relied in *Greene* in im-

posing an unusually strict standard (see 360 U.S. at 506) for finding authorization by the President or Congress of the procedures followed. If ordinary standards are applied, authorization for a summary procedure is clear. But even if the *Greene* principle does apply and the clearest authorization must be shown, we submit that this criterion has been satisfied.

Congress has provided that the Secretary of the Navy has complete custody and charge of all property of the Navy Department (10 U.S.C. 5031(c)) and that he has the authority to issue regulations for the custody, use, and preservation of this property (5 U.S.C. 22; 10 U.S.C. 6011). Regulations promulgated by the Secretary, and specifically approved by the President, state that "[t]he responsibility of the commanding officer for his command is absolute," and that "dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer * * *." Navy Regulations (1948), Articles 0701, 0734.¹⁰ Moreover, the regulations give the Chief of Naval Operations authority to issue supplementary directives including a Security Manual (*id.* Article 1502). These directives similarly give the commanding officer of an activity "full discretion" over the entrance of personnel of private contractors; declare that the commanding officer "alone remains responsible for the overall security of his command"; and provide that the ordinary administration of the security system within the activity is

¹⁰ Section 3 of the Administrative Procedure Act (5 U.S.C. 1002) provides that such regulations "relating solely to the internal management of an agency" need not be published in the Federal Register.

normally delegated to the Security Officer. Navy Security Manual for Classified Matter, October 2, 1954, Sections 1403, 1409; Navy Physical Security Manual, April 14, 1956, Sections 0154, 0156.

These statutes, regulations, and manuals give complete authority to the commanding officer to decide security matters in general and, more particularly, give him full power to select or screen those persons who shall have access to the installation. This authorization is confirmed by the actual practice of military commanders throughout our history; they have regularly exercised authority to admit or exclude civilians selectively, as they deemed appropriate at the time.¹¹ Indeed, it appears that until this litigation it has never even been seriously suggested that military commanders lacked authority summarily to exclude persons seeking to enter their commands.

2. Petitioners also contend (Pet. 22-23) that, if respondents' procedure was authorized, it violated (as applied here) the Fifth Amendment.¹² This claim, however, arises in the most difficult context for sustaining the right to employment against alleged fed-

¹¹ On the other hand, in *Greene*, the Court noted that, prior to World War II, only "sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense." 360 U.S. at 493.

¹² Petitioners claim that the First Amendment also was violated. Certainly, the naval commander here could have withdrawn petitioner Brawner's badge for security reasons after a full trial-type hearing even though freedom of speech, the press, and association might to some extent be indirectly affected. The only issue then is whether such procedures are required by the due process clause of the Fifth Amendment.

interference which has yet come before this Court. In *Bailey v. Richardson*, 341 U.S. 918, the Court affirmed by an equal division a court of appeals' decision upholding the constitutionality of the Federal Employees Loyalty Program. That program directly deprived the employee of his employment on the basis of a finding relating to his loyalty and after hearings in which he did not have the opportunity to confront adverse witnesses.¹² In the *Greene* case, the Court found it unnecessary to pass on the constitutionality of the Industrial Personnel Security Program. By denying clearance, the latter program may in many instances (as in *Greene*) cause the loss of employment with a private company operating on its own property, and in some instances the drastic curtailment of all employment opportunities. On the other hand, the circumstances of the instant case present a stronger governmental interest, coupled with an interest of the employee which is significantly greater than in *Bailey* or *Greene*.

The government has absolute control over property within the United States and under this power may exclude the public from such property even when this causes pecuniary damage. See *Utah Power and Light Co. v. United States*, 243 U.S. 389; *United States v. Southwest Oil Co.*, 236 U.S. 459; *Light v. United States*, 236 U.S. 523; *Camfield v. United States*, 167 U.S. 518. In addition, here the governmental property is a military installation. The need of military commanders

And see *Vitarelli v. Seaton*, 359 U.S. 535, 539, where the Court suggested that a government employee not protected by statute or regulation could be summarily discharged.

for absolute control over access to their installations is especially clear; and this control has been exercised without substantial question throughout our history. Commanding officers, in allowing petitioner Brawner and other employees of private contractors into military installations, convey no right of access in derogation of their absolute control. Rather, these employees are merely granted permission, subject to the ordinary prerogatives of the commanding officer, to enter the base for the convenience and benefit of the United States. In this case, these overriding prerogatives were embodied in the contract of the Board of Governors of the cafeteria with the Concessionaire, by the provision preventing the Concessionaire from employing in the Gun Factory any employees not meeting the Naval installation's security requirements or other regulations of the Security Officer (R. 6). The Union's collective bargaining agreement and Mrs. Brawner's employment with the Concessionaire were subject to this contract with the employer.

In comparison to the obvious interest and long history of absolute government control over access by civilians to military installations, the interest of Mrs. Brawner and other persons similarly situated is far outweighed. Unlike the employees in the *Bailey* and *Greene* cases, petitioner Brawner's relationship with her employer was not severed. Instead, she was offered a transfer to another position with the same company some miles away. And, as we have shown (pp. 9-11), even in situations where the employee does in fact lose his job entirely, it would be rare indeed when comparable positions in the same occupation

were not readily available. Finally, on this record Mrs. Brawner has not been accused of being in any way disloyal. The military commander revoked the badge "for security reasons" (R. 41, 99)—which includes a multitude of different reasons relating to possible interference with the military mission of the base, including being accident-prone¹⁴—and the Concessionaire offered to transfer her because she could no longer be employed on the base under its contract. No "stigma" of disloyalty in any meaningful sense has been placed upon her. In sum, her interests in a trial-type adjudication fail significantly when measured against the government's overriding interests in controlling its military posts, and against the established history of that control.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1960.

¹⁴ See Naval Physical Security Manual, April 14, 1956, Section 0250, 0260-0261.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 97

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*

v.

NEIL H. McELROY, Individually; THOMAS S. GATES,
Individually and as Secretary of Defense; D. M.
TYREE, Individually and as Superintendent of the
United States Naval Gun Factory; and H. C.
WILLIAMS, Individually and as Security Officer of
the United States Naval Gun Factory,
Respondents

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The en banc opinion of the Court of Appeals, Judges
Edgerton, Bazelon, Fahy and Washington dissenting,
is not yet reported (R. 144-181). The opinion of the
division of the Court of Appeals reversed by the en

bane decision, Judge Danaher dissenting, will not be reported (R. 134-139).¹

JURISDICTION

The judgment of the Court of Appeals was entered on April 14, 1960 (R. 182). The petition for a writ of certiorari was granted on October 10, 1960 (R. 200). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A civilian nongovernmental employee works as a short order cook at a cafeteria located within the premises of the Naval Gun Factory. The employee works for a civilian nongovernmental employer who operates the cafeteria under a contract with the Naval Gun Factory. The superintendent of the Naval Gun Factory and his security officer cause the employee to lose her job at the cafeteria because she allegedly fails to meet the "security requirements." There was no disclosure of what the security requirements constitute, no statement of reasons particularizing the respects in which the employee allegedly failed to satisfy them, and no hearing of any kind at which to know or meet the evidence supporting the bare conclusion. The question presented is whether the officers acted without authority, and if their action was authorized, whether it was constitutional.

STATUTES INVOLVED

The constitutional, statutory, and administrative provisions are too numerous to list and are set forth in relevant part in the course of the brief.

¹ An order entered on April 18, 1960, withdrew the division's opinion and stated that it would not be published (R. 183).

STATEMENT

I. The Status of the Union, the Employer, and the Employees: the Employer's Agreements With the Union and the Naval Gun Factory

M & M Restaurants, Inc., a civilian nongovernmental employer, operated three main cafeterias for and on the premises of the United States Naval Gun Factory,² a naval installation located within the District of Columbia on federal property (R. 4, 5, 90, 93, 97, 107). The workers in the employ of M & M who man the cafeterias are civilian nongovernmental personnel (*ibid.*).

Up to September 1946, the cafeterias at the Gun Factory had been operated by a Miss H. K. Dickson. In 1942, during the period of Miss Dickson's operation, Petitioner Union was certified by the National Labor Relations Board as the exclusive bargaining representative of the employees working at the cafeterias, following an election conducted by the Board on July 15, 1942. (R: 4-5, 49-50, 90, 93.) In September 1946, M & M took over the operation of the cafeterias from Miss Dickson (R. 5, 90, 93). From that time, throughout the period of its operation of the cafeterias, M & M recognized the Union as the exclusive bargaining representative of its employees at the cafeterias (R. 5, 90). Section 1 of the collective bargaining agreement between M & M and the Union, entered into on March 15, 1954 and in effect at the times material to this controversy, provides that (R. 5, 18-19, 90):

The Employer agrees to recognize the Union as the exclusive bargaining agency for all employees (excluding cashiers, checkers, and supervisors) of

² Effective July 1, 1959, the name of the Gun Factory was changed to the United States Naval Weapons Plant. Washington *Evening Star*, p. B-1, col. 6, May 18, 1959.

the Navy Yard Cafeterias, and of all cafeterias or food serving establishments which the Employer may take over and operate within the Navy Yard.

Section 6 of this collective bargaining agreement provides in part that (R. 5, 19, 90):

The Employer agrees not to suspend or discharge any employee without good and sufficient cause.

This provision has been in each of the collective bargaining agreements between M & M and the Union since the inception of their relationship in September 1946 (R. 5, 50, 90).

M & M operated the cafeterias pursuant to an agreement, entered into on October 1, 1955, between M & M and the Board of Governors of the Naval Gun Factory Cafeterias. This agreement is styled "Agreement For Food Services Concessionaire." The personnel of the Board of Governors, composed of seven civilian governmental employees employed by the Gun Factory, are appointed by the Superintendent of the Gun Factory. (R. 5-6, 90, 94.) Section 5(b) of the Concessionaire Agreement provides that (*ibid.*, emphasis supplied):

The Concessionaire shall engage all the personnel necessary to maintain efficient service at a high standard of cleanliness and sanitation, and shall be responsible for all compensation due to such personnel pursuant to the operation under this Agreement. *In no event shall the Concessionaire engage or continue to engage, for operations under this Agreement, personnel who*

(i) fail to pass satisfactory medical examinations where the handling of food is involved;

(ii) are not courteous, conscientious and competent to perform the duties to which they are assigned;

(iii) *fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity.*

II. M & M's Separation of Petitioner Rachel M. Brawner From Employment at the Bellevue Annex Cafeteria at the Request of the Security Officer of the Naval Gun Factory

One of the cafeterias operated by M & M for the Gun Factory is known as the Bellevue Annex Cafeteria, located at Overlook Drive and Chesapeake Street, S. W., Washington, D. C. Petitioner Rachel M. Brawner worked at that cafeteria as a short order or breakfast cook. Up to her separation on November 15, 1956, Rachel Brawner had been employed by M & M for six and one-half years. Working Monday through Friday, 6:00 a.m. to 3:00 p.m., at the hourly rate of \$1.18, she operated the steam table at the cafeteria, prepared and served breakfast and lunch, cleared tables, washed dishes, and cleaned up. Rachel Brawner's employment record was completely satisfactory and she was above average in the discharge of her duties. (R. 6, 27, 39-41, 62, 90, 94.)³

On November 14, 1956, H. R. Pyles, Secretary-Treasurer of the Board of Governors, telephoned

³Rachel Brawner, 38 years old, is married, lives with her husband, and has nine children. A resident of the District of Columbia since she was three, she attended the District schools to the eleventh grade. A member of the John Stewart Memorial Church, a Methodist church, she attends services regularly. Rachel Brawner reads Good Housekeeping, Readers Digest, Better Homes and Gardens, and Watchtower, and she belongs to the Condensed Book Club, the books of which are put out by the Readers Digest. Her daily newspaper fare consists of the Washington Star and the Washington News. She favors the Democratic Party. (R. 38-39, 44-45.)

Harold R. Baker, supervisor of M & M's cafeterias at the Gun Factory, to request that M & M have Rachel Brawner turn in her identification badge (R. 7, 90, 94). Pyles informed Baker that respondent H. C. Williams, security officer of the Gun Factory, had advised that a question of security clearance for Brawner existed and that he, the security officer, would no longer permit her to have the badge (R. 7, 36-37, 56, 90, 98).⁴ Pyles further told Baker that, should the request to lift Brawner's identification badge be questioned in view of the provision of the collective bargaining agreement safeguarding employees from discharge except for "good and sufficient cause," section 5(b) of the Concessionaire Agreement should be cited as authority for the action requested (R. 7, 68-69, 90).⁵

⁴ While respondents in their answer to the complaint denied the allegation contained in this sentence (R. 94), in their answers to interrogatories they stated that "Mr. Baker inquired as to the reason [for having Rachel Brawner surrender her identification badge to Lieutenant Commander Williams] and was informed that it was for security reasons and that the badge was to be returned as soon as possible" (R. 98). The import of the allegation of the complaint and the answer to the interrogatory is therefore identical. The Company admitted the allegation of the complaint (R. 90), and the allegation corresponds to the sworn and uncontroverted testimony at the arbitration hearing (R. 36-37, 56).

⁵ While respondents in their answer to the complaint denied the allegation contained in this sentence (R. 94), their answer to the interrogatories simply failed to advert to this element of the conversation (R. 98-99). This element of the conversation was admitted by M & M in its answer (R. 90), and it corresponds to the sworn and uncontroverted testimony of its agent at the arbitration hearing (R. 68-69, 62-63), the agent having participated in the conversation. Furthermore, in his letter to counsel for the Union, respondent Tyree, superintendent of the Gun Factory, specifically adverted to Section 5(b)(iii) of the Concessionaire Agreement as authority for the action taken (R. 32-33). There is therefore no reason to doubt this element of the conversation. It is in any event not material to the disposition of the questions of law.

On November 15, 1956, M & M relieved Rachel Brawner from work at the cafeteria, and instructed her to proceed to the office of Harold R. Baker. There, Baker stated to Brawner that he had been requested to pick up her identification badge, and, when asked why, he stated "for security reasons." Shocked and surprised, Brawner denied that she had ever done anything to bring her security status into question, and she asked what recourse she had. Baker stated he could not tell her anything except that he had been directed to pick up her badge. He suggested that she might see the security officer, or the superintendent, or Oliver T. Palmer, the business agent of the Union. Brawner turned in her badge. (R. 12, 41-42, 61, 90.) As Rachel Brawner testified at the ensuing arbitration hearing (R. 41-42):

Well, when I first went in, I sat down and Mr. Baker told me that he was sorry, that he had been told to pick up my badge, and I asked Mr. Baker what for, and he said: "For security reasons."

I said "What about security? I haven't did anything. I don't know anything that I did."

And he said: "That's all I know, to pick up your badge."

I said: "What must I do or who do I see?"

He said: "Write a letter to the Superintendent of the Yard," and he said "I would"—well, he said if he were me, he would write a letter to the superintendent.

* * *

I turned my badge over to Mr. Baker, and he asked the clerk to write me a slip of paper to get out of the gate, so that I could show it to the Marine on the gate.

Baker testified at the arbitration hearing that he observed that "naturally it upset her a great deal"; he noted that "I could not tell her anything except I had been directed to take such an action"; and he "tried to explain to her the several steps which I thought might be possible for her to follow, including going to the Security Officer himself, and to the Superintendent, and of course I also told her to see Mr. Palmer, her business agent" (R. 61).

On November 15, 1956, Baker turned over Brawner's identification badge to the security officer, respondent H. C. Williams. At that time, admittedly, the security officer gave no reason for his action, except to say that he would not permit her to continue to retain the badge because her security status was in question. Admittedly, neither before, then, nor thereafter did the security officer, the superintendent, the Board of Governors, or any other official give any explanation for this conclusion to either Brawner, the Union, or M & M (R. 8, 90, 94).

On November 16, 1956, M & M received a confirmatory memorandum from the Board of Governors (R. 8, 58, 91, 95):

1. The Board was notified on the afternoon of November 14, 1956 by LCDR H. C. Williams, Security Officer, Naval Gun Factory, that Rachel Brawner, head steam table employee, presently working at the Bellevue Cafeteria, would have to surrender her Naval Gun Factory badge and would not be permitted to enter the Naval Gun Factory until clearance is certified by the Security Officer.
2. This office immediately contacted Mr. Baker and requested to return the badge. Rachel Brawner's badge was returned to the Security Officer on 15 November 1956.

From November 15, 1956, Rachel Brawner no longer worked for M & M. From that day forward she has received no wages or other benefits from M & M. (R. 13, 90)

An identification badge is required to secure entrance to and exit from the grounds of the Gun Factory (R. 7, 90, 94). At the time of her initial employment at the Gun Factory, Rachel Brawner had been, as are all employees, screened to determine her eligibility to receive an identification badge, and no question of her eligibility to have it had been raised for six and one-half years (R. 8, 63-67, 99-100, 101-103).

In the course of her employment at the cafeteria Rachel Brawner had no access to classified information. Indeed, Harold R. Baker, supervisor of M & M's cafeterias at the Gun Factory, has no access to classified information. (R. 8, 68, 94, 99.)⁶

⁶ The opposition to certiorari states that Rachel Brawner did not have access to classified information (p. 10, n. 8). The answer of respondents admitted that Brawner and Baker "have no authorized access to classified information" (R. 94). In reply to an interrogatory designed to determine whether this admission was intended to imply that Brawner and Baker may have other than authorized access to classified information (R. 97), respondents stated: "Neither Brawner nor Baker have authorized access to classified information, however the defendants are unable to state whether or not Brawner or Baker have had access to any of the restricted areas on the premises of the Naval Gun Factory or whether Brawner or Baker have access to any classified information" (R. 99). In his testimony at the arbitration hearing, in answer to a question whether Rachel Brawner had access to classified information, Baker replied, "I hardly think so"; and in answer to the question whether he had access to classified information, Baker replied, "No, sir" (R. 68). As she testified at the arbitration hearing, Rachel Brawner's work at the cafeteria as a short order cook kept her fully occupied (R. 39-41), and she did not even know what went on in the two offices of the very building in which the cafeteria was housed (R. 39). Moreover, re-

III. The Attempt to Guess at the Reason for the Conclusion That Rachel Brawner Failed "to Meet the Security Requirements. . . ."

On November 15, 1956, immediately following her separation from employment, Rachel Brawner went directly to see Oliver T. Palmer, business agent of the Union, and reported to him what had transpired (R. 8, 42, 91). In her earlier conversation with Baker, Brawner had understood him to say that the question relating to her security clearance pertained to "something which happened in 1946" (R. 42). Accordingly, Palmer asked her to search her mind as to anything which might have happened in 1946 which might bear on her security (R. 42). At that time Brawner had been employed at Lansburgh's (R. 42), a department store in the District of Columbia. She recalled seeing the Daily Worker in another employee's possession at Lansburgh's (R. 42). Brawner then thought it was a "regular newspaper," "something like a Union would put out"; she later learned as a result of newspaper stories concerning the Rosenberg espionage case that it was a Communist paper (R. 43). As to the employee

spondents merely say they "are unable to state" whether Brawner or Baker have other than authorized access to classified information or restricted areas; what they are unable to state they cannot assert. Finally, any implication that access to classified information consists in being at a location where such information exists is flatly in conflict with the United States Navy Security Manual for Classified Matter. Section 0206 of the Manual defines "classified matter" as "official information or material in any form or of any nature the safeguarding of which is necessary in the interest of national defense and which is classified for such purpose by responsible classifying authority." Section 0201 defines access to be the "ability and opportunity to obtain knowledge of classified matter. *An individual does not have access to classified matter merely by being in a place where such matter is kept, provided the security measures which are in effect prevent him from gaining knowledge of such classified matter.*" (Emphasis supplied.)

in whose possession the paper was, Brawner did not then know, and does not now, whether she is a Communist; this employee never asked Brawner to engage in Communist activity or to join the Party (R. 43). This employee never discussed Communism, and all that Brawner knows of her in this connection is that she "saw her one day with a Daily Worker in her hand" (R. 43).

Actually it appears that Brawner misunderstood Baker's reference to 1946. As Baker testified at the arbitration hearing, he told Mrs. Brawner that a security investigation "could go back to 1945 or 1946, wherever you had your first job" (R. 64). He did not intend to suggest that anything did then transpire, for, as he testified, "I have no knowledge of anything relating to her within that time" (R. 65).⁷

⁷ In order to suggest that the determination that Rachel Brawner did not meet security requirements may have been based on other than loyalty-oriented reasons, the concurring opinion opines that "Mrs. Brawner might even have been personally insanitary in her food handling and had so become a risk" (R. 166, n. 5), and the opposition to certiorari mentions "being accident-prone" (p. 17). In the absence of a hearing based on a statement of reasons the multiplication of might-be's is as limitless as a lively imagination. But it is certain that Rachel Brawner was neither "insanitary" nor "accident-prone." For M & M has repeatedly stated that her employment record was completely satisfactory and she was above average in the discharge of her duties (R. 6, 27, 62, 90, 94); M & M "never had any question about her ability or qualifications . . . and there was no question about her work" (R. 62). This is not how an "insanitary" or "accident-prone" employee is evaluated. Furthermore, such reasons do not fall within the "security requirements" clause of Section 5(b)(iii) of the Concessionaire Agreement, but rather within the "not courteous, conscientious and competent to perform the duties" clause of Section 5(b)(ii), or the "fail to pass satisfactory medical examinations where the handling of food is involved" clause of Section 5(b)(i) (*supra*, pp. 4-5). To invoke the "security requirements" clause necessarily excludes any reasons comprehended by the first two clauses.

IV. Efforts to Secure Rachel Brawner's Restoration to Employment at the Bellevue Annex Cafeteria

At a meeting of representatives of M & M and the Union on November 20, 1956, and in ensuing correspondence between them, the Union protested that M & M's separation of Rachel Brawner was "without good and sufficient cause" and hence in violation of the collective bargaining agreement (R. 8-9, 20-21, 22-23, 45-48, 91). The Union repeatedly sought from M & M a statement of the reasons underlying the conclusion that Rachel Brawner did not meet security requirements (*ibid.*). M & M repeatedly replied that it did not know, and was unable to obtain from either the security officer or the superintendent of the Gun Factory, an elucidation of the underlying reasons (R. 8-9, 21-22, 23, 26-28, 46-47, 91). The Company took the position that its action was based on Section 5(b) (iii) of the Concessionaire Agreement (*ibid.*).

In connection with its attempt to secure a statement of reasons, the Union also requested that a meeting be arranged with officials of the Gun Factory at which to discuss the matter, and that a fair hearing be accorded Rachel Brawner (R. 9, 46-47, 91). On December 12, 1956, M & M wrote the Board of Governors of the Gun Factory Cafeterias to request "that a meeting be arranged . . . for the purpose of a hearing relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner" (R. 9, 25, 91, 95). But the superintendent of the Gun Factory refused to meet, stating that "the meeting proposed . . . would serve no useful purpose and is therefore unnecessary." Thus, on January 10, 1957, the Union was advised by M & M that (R. 9, 26-27, 91):

We have been informed by the Superintendent, U.S. Naval Gun Factory via the Board of Gov-

ernors, U.S. Naval Gun Factory Cafeterias, that such a meeting would serve no useful purpose and is therefore unnecessary.

This response was based on a memorandum to M. & M. from the Board of Governors, which enclosed a memorandum from the superintendent to the Board of Governors (R. 10, 59-60, 91, 100). The latter memorandum reads (*ibid.*):

1. By reference (a), the Chairman of the Board of Governors, Naval Gun Factory Cafeterias, requested that a meeting be arranged, participants consisting of the Naval Gun Factory Security Officer, members of the Board of Governors, representatives of M & M Restaurants, Inc. and agents of the Restaurant Employees Union to discuss the action relative to the denial of admittance to the Naval Gun Factory of Rachel Brawner, a cafeteria employee.

2. Paragraph 5(b) iii of reference (b) [Agreement for Food Services Concessionaire] stipulates that the contractors will employ only those who meet the security requirements for admission to the Naval Gun Factory. It is considered that the subject cafeteria employee does not meet these security requirements and therefore entrance privileges to the Naval Gun Factory have been revoked.

3. It is considered that the above decision is proper in this case and that *the meeting proposed in reference (a) would serve no useful purpose and is therefore unnecessary.* [Emphasis supplied.]

On January 30, 1957, the Union's attorney wrote to the superintendent of the Gun Factory to request the procedure and authority for the action taken against Rachel Brawner (R. 11-12, 31-32, 91, 95). This letter reads in part that (*ibid.*):

We are informed that on November 15, 1956, Mrs. Rachel Brawner, an employee of M & M Restaurants, Inc. at the Naval Gun Factory cafeteria and a member of the Union, was discharged by the employer because you or your security officer determined that Mrs. Brawner did not meet security requirements. As presently advised, we have been unable to ascertain under what authority, and in accordance with what procedure, that security determination was made. Would you therefore be good enough to apprise me of the statute, executive order, departmental regulation, and/or other basis pursuant to which this determination was made.

The superintendent replied under date of February 27, 1957, stating in part that (R. 12, 32, 91, 95):

The written agreement entered into by the Board of Governors, U.S. Naval Gun Factory Cafeterias and M & M Restaurants, Inc. on 1 October 1955 specifies that the employees of the M & M Restaurants, Inc. who work in the Naval Gun Factory Cafeterias must meet the basic security requirements as regards entrance to the Naval Gun Factory. It was determined that Mrs. Rachel Brawner did not meet the basic requirements and thus her pass was revoked.

Meanwhile, on January 11, 1957, the Union had invoked arbitration of the dispute under the terms of the collective bargaining agreement, claiming that M & M "discharged Rachel Brawner without good and sufficient cause" (R. 10-11, 29-30, 91). On April 17, 1957, the Union's attorney wrote to the superintendent of the Gun Factory to apprise him of the arbitration hearing to be held on May 2, 1957, and to state that (R. 12, 33-34, 91, 95):

You are invited, personally or by a representative, to attend the hearing to state your position

and present evidence in its support relevant to your part, or that of your subordinates, in causing Mrs. Brawner's discharge.

No appearance was made either personally or by a representative (*ibid.*).

On August 6, 1957, after hearing, the Board of Arbitration, one member dissenting, held that "Rachel Brawner was not discharged without good and sufficient cause . . ." (R. 71). The majority based its conclusion on its view that (1) Rachel Brawner had not been discharged because M & M has "always said that her services were excellent and that they would put her back to work immediately if she could prevail on the government officials to restore her security badge" (R. 75),* and (2) the "real grievance of the employee and of her Union has never been against the Company; it has been and is against those who have (wrongfully,

* Without giving any reasons the court below also concludes that Rachel Brawner was not discharged (R. 148; 159, 162). The basis for the conclusion eludes comprehension. After November 15, 1956, she no longer worked for M & M (R. 13, 90); she no longer received wages or other benefits from M & M (R. 13, 90); and this state of affairs was brought about by M & M's compliance with its promise contained in Section 5 (b) (iii) of the Concessionaire Agreement that it would "*In no event . . . continue to engage, for operations under this agreement, personnel who . . . fail to meet security requirements . . . as determined by the Security Officer . . .*" (*supra*, pp. 4-5, 6, 12, 13, 14; emphasis supplied). "Discharge normally means termination of the employment relationship or loss of a position." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 286; see also, *Anderson v. Twin City Rapid Transit Co.*, 84 N.W. 2d 593, 598 (Minn.), and cases cited. That is what happened to Brawner. The employment relationship was terminated; she lost her position. M & M's expression of willingness to *rehire* Brawner if in the future she could secure an identification badge confirms rather than negatives her effective present severance from employment. If Rachel Brawner was not discharged, what was she?

she contends) denied her physical access to the place of her employment" (R. 76).⁹

⁹ Another Board of Arbitration in a similar context did not take so limited a view of its functions (R. 13-14, 91, *National Food Corp.*, 24 LA 567). In the latter case the Director of Security Division, Office of the Secretary of Defense, through the Department of Defense Concessions Committee, requested the employer, National Food Corporation, to discharge an employee, Esther Mae Thompson; Thompson worked in a cafeteria within the Pentagon operated by the employer; the ground for the request to discharge Thompson was the determination by the Director of Security Division that her security status was in question (*ibid.*). The Board of Arbitration held that Thompson's discharge was without "sufficient cause," and it ordered her reinstated with back pay (*ibid.*). In reaching this conclusion, the Board reasoned *inter alia* that (R. 13-14, 24 LA at 572):

The Company contends that this Board of Arbitration is without power to review the determination of the Director of Security Division, Office of the Secretary of Defense, that Thompson was a security risk. This contention would be relevant if the Director were *authorized* to determine that an employee in Thompson's class was a security risk and to request the employee's discharge upon such determination. But the Company has not shown, and our independent search has not uncovered, any statute, executive order, or regulation authorizing the Director to act in the premises. The Company concedes that neither the Industrial Personnel and Facility Security Clearance Program, applicable to nongovernmental employees with access to classified information, nor the security requirements for government employment, applicable to government employees, have any relevance to an employee in Thompson's position. Not only do these programs not confer any authority on the Director with respect to an employee in Thompson's position, but by not conferring any such authority they negate the existence of the authority assumed by the Director. It is significant that the very safeguards accorded nongovernmental employees with access to classified information or accorded governmental employees by these programs would have prevented just the summary action to which Thompson, a *nongovernmental employee with no access to classified information*, was subjected. [Emphasis in original.]

Following this award, Thompson was reinstated, with back pay, and she continues to date to work in the cafeteria in the Pentagon (R. 13-14, 52-53, 91).

No member of the Board of Arbitration doubted the injustice done Rachel Brawner. The Chairman stated at the arbitration hearing that (R. 69-70):

... what opportunity did this woman have to state her case or to obtain any information, or get any clarification of the reason for the picking up of her badge, which is of course the pivotal or crucial step in this whole proceeding?

All she was told was "surrender your badge," and despite efforts by the Union, and by the Union counsel, to this day she has not been told what the charge is against her.

* * *

Not only was there no hearing or no clarification or no specification, but not even a statement on which the ultimate conclusion was reached. It was just said that she was not satisfactory from a security standpoint, which may mean anything.

And M & M's designee on the Board of Arbitration stated at the hearing that: "Our position is heartily in accord with the viewpoint of the Union on this, and we are in entire agreement and we hold no brief for the Security Officer's actions . . ." (R. 70).

V. Proceedings in the District Court and Events Transpiring After the Filing of the Complaint

Thereafter, on September 6, 1957, petitioners filed a complaint in the United States District Court for the District of Columbia against respondents and M & M (R. 2-18). Following answers and responses to interrogatories (R. 89-103), petitioners moved for summary judgment on February 8, 1958 (R. 103), and respondents on February 27, 1958 moved to dismiss the complaint, or, in the alternative, for summary judgment in their favor (R. 103).

Meanwhile, the Concessionaire Agreement between M & M and the Board of Governors of the Gun Factory Cafeterias, which expired on January 31, 1958, was not renewed, and since February 1, 1958, the cafeterias have been operated by a newly formed corporation known as Inplant Foods Incorporated (R. 107, 124). The two officers of Inplant are Harold R. Baker, President and Treasurer, who had been supervisor of the cafeterias operated by M & M at the Gun Factory, and Claude S. Breeden, Jr., Vice-President and Secretary, who had been secretary of M & M (R. 124).

On January 16, 1958, a conference was held between Baker and Breeden, on the one hand, and Palmer and Bea, respectively business agent and president of the Union, on the other (R. 124). At this conference Palmer and Bea were informed that Inplant was taking over the operation of the cafeterias on February 1, 1958 (R. 124). The remainder of the conference was devoted to discussing and reaching agreement upon the status of the Union, the existing collective bargaining agreement, and Rachel Brawner (R. 124). Inplant recognized the Union as the exclusive bargaining representative of the employees working at the cafeterias of the Gun Factory; it assumed all the obligations of the collective bargaining agreement; and it agreed to reinstate Rachel Brawner should petitioners prevail in the pending suit (R. 124-130). The agreement pertaining to Brawner is that (R. 125, 127, 128):

The new company will reinstate Mrs. Rachel Brawner with retroactive seniority rights, and further accumulation thereafter, if, as a result of the pending suit in the United States District Court by the Union against certain government officials and M & M Restaurants, Inc. it is held

in effect that M & M Restaurants, Inc. or said government officials acted without legal authority. The new company shall, however, not be liable for back pay, except for back pay accruing after any breach by it of its refusal [*sic*, promise] to reinstate Mrs. Brawner as required by this paragraph.

The District Court thereafter entered an order without opinion dismissing the complaint (R. 132).

VI. The Decision of the Court of Appeals

The ensuing appeal was heard by a division of the Court of Appeals composed of Judges Edgerton, Fahy, and Danaher. After argument of the appeal, this Court decided *Greene v. McElroy*, 360 U.S. 474. Upon the authority of that decision, the division of the Court of Appeals reversed, Judge Danaher dissenting. Judge Edgerton in his opinion stated in part that (R. 135):

On June 29, 1959, the Supreme Court determined that the Secretary of Defense and his subordinates have not been empowered to deny a contractor's employee access to his work, and thereby deprive him of his job, on security grounds, "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination." *Greene v. McElroy*, 360 U.S. 474. What government officers are not empowered to do in such a proceeding, which includes a limited sort of hearing, they are not empowered to do in a proceeding that includes no hearing at all. As in the *Greene* case, if the action of the government officers was in accordance with Navy regulations, the regulations were unauthorized and invalid.

A petition for rehearing *en banc* was granted (R. 139). A new majority, by a five to four vote, reversed the decision of the division, and affirmed the judgment

of the District Court (R. 182). The essence of the opinion of the new majority is that (1) governmental officers have unfettered power to control access to federal property, and that (2) Rachel Brawner, as a cook, could work elsewhere, and was therefore not totally debarred from employment (R. 144-164). Judges Edgerton and Fahy adhered to their earlier position (R. 175-181), and they were joined in dissent by Judges Bazelon and Washington, the latter stating that "We agree with Judges Edgerton and Fahy that the case must be reversed on the authority of *Greene v. McElroy*" (R. 181).¹⁰

SUMMARY OF ARGUMENT

I.

Greene v. McElroy, 360 U.S. 474, controls. Respondents assert the authority, at least where the place of civilian nongovernmental employment is on federal property, to cause a civilian nongovernmental worker to lose her private employment on security grounds and otherwise injure her, without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to satisfy them, and without any hearing of any kind at which to know and meet the evidence supporting the conclusion. This Court in *Greene v. McElroy* held that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). Unlike William Greene who had at least a limited hearing, Rachel

¹⁰ The Court of Appeals unanimously affirmed the dismissal of the complaint against M & M (R. 136, 162). Certiorari to review this disposition has not been sought.

Brawner had no hearing at all; and unlike William Greene who did have access to classified information, Rachel Brawner had no access to classified information. Since a limited hearing was an unauthorized basis for causing an employee with access to classified information to lose his job "in the absence of *explicit authorization* from either the President or Congress," it follows *a fortiori* that neither the President nor Congress "specifically has decided" (*id.* at 507) to delegate the even more expansive prerogative of acting without any hearing at all with respect to an employee without any access to classified information.

II

In this case respondents acted without even internal *departmental* authority, much less did they possess executive or congressional sanction for their conduct.

A. The regulations of the Department of Defense, both before and after this Court's decision in *Greene v. McElroy*, confine the security program to private employers and private employees who have access to classified information. All others in private employment are to be let alone. As to those with access to classified information, the regulations afford a limited hearing to the affected employee, and since *Greene v. McElroy* as a result of executive direction the limited hearing includes a limited opportunity to cross-examine.

Yet respondents in this case presumed to decide that Rachel Brawner did not meet the "security requirements" with no notice, no specification of reasons, no opportunity to answer or be heard, and no standards. And they assert this power to act summarily despite the fact that they concede that, had Rachel Brawner had access to classified information, she would have been

entitled to these safeguards. For, in their opposition to certiorari, they state, referring to "civilians employed on military bases by private contractors" (p. 10), that "employees who, unlike petitioner, have access to classified information . . . generally come within the Industrial Security Program to which the *Greene* case applied . . ." (p. 10, n. 8). Thus respondents denied Rachel Brawner, who had no access to classified information, even the safeguards of a limited hearing which they agree is vouchsafed to employees with access to classified information. It turns things upside down for respondents to assert, as they must and do, that they had departmental authority to accord no hearing to an employee who had no access to classified information, when by their own regulation they were required to accord at least a limited hearing to an employee with access to classified information. The true teaching is that employees who do not have access to classified information are to be let alone.

B. Rachel Brawner worked in private employment as a short order cook under a collective bargaining agreement which safeguarded her from discharge or suspension "without good and sufficient cause." The equivalent to this status in governmental employment is a position within the competitive civil service. It is therefore pertinent to observe that, had Rachel Brawner worked in this equivalent status as a short order cook in the cafeteria of the Gun Factory as a governmental employee, respondents could not have summarily discharged her. When federal officers presume to act towards private employees in a way alien to the laws protecting governmental employees, the assertion of such authority is heavily suspect. For it is unthinkable that the Government through any of its organs would show less scrupulous concern to safe-

guard the interests of persons in private employment, towards whom it owes a duty to refrain from "illegal interference or compulsion" in the exercise of the "right to earn a livelihood and to continue in employment unmolested,"¹¹ than it manifests towards its own employees, over whom it can assert plenary authority within constitutional limits.¹²

C. To establish departmental authority, respondents invoke administrative materials, not published in the Federal Register, in accordance with which, they state, Rachel Brawner had the status of a "visitor" to the Gun Factory, and the "commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted" (*infra*, p. 46). The short answer is that Rachel Brawner was not a visitor to whom the visitor control procedures are applicable. Indeed, the Navy Security Manual for Classified Matter, upon which respondents principally rely, negates any authority to treat Rachel Brawner as a visitor. That manual separately identifies persons like Rachel Brawner as "contractors' employees" or "contractor personnel." For the security procedures pertinent to such personnel the manual directs reference to the Armed Forces Industrial Security Regulation. This regulation requires that personnel security clearance of contractors' employees, if it is not to be granted, shall be referred "to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation" (*infra*, p. 52). And the upshot of the latter regulation is that an employee with no access to classified information is to be let alone, and an employee with

¹¹ *Truax v. Raich*, 239 U.S. 33, 38.

¹² See *United Public Workers v. Mitchell*, 330 U.S. 75, 100.

access to classified information is to be given at least a limited hearing. Thus the very manual invoked by respondents negatives any departmental authority to deprive a private employee of his job on security grounds without a hearing of any kind.

In any event, since none of the administrative material upon which respondents rely was published in the Federal Register as required by Section 3(a) of the Administrative Procedure Act, respondents' action was unauthorized upon this independent ground.

.D. By Section 5(b) (iii) of the Food Services Concessionaire Agreement, the employer had contracted not to "engage, or continue to engage, for operations under this Agreement, personnel who . . . fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity." Respondents do not dispute that this agreement does not constitute a valid source of authority. Authority which does not exist in the absence of the agreement cannot be conferred by it. All that the agreement does is to reduce to writing the arrogation of authority never granted. Moreover, the agreement is invalid because in conflict with the National Labor Relations Act. That Act "makes it the duty of the employer to bargain collectively with the chosen representative of his employees. The obligation being exclusive, . . . it exacts 'the negative duty to treat with no other.'"¹³ Section 5(b) of the Concessionaire Agreement is the product of the employer's violation of his statutory duty "to treat with no other" than the Union "in respect to rates of

¹³ *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678, 683-684.

pay, wages, hours of employment, or other conditions of employment."

E. If respondents had departmental authority to act, it is void for lack of executive or congressional sanction. No executive authority is claimed or exists. The statutes urged in this case to establish congressional authority to act without any hearing at all are less substantial than the statutes which in *Greene v McElroy* were held not to establish authority to act on the basis of a limited hearing. And to say that the administrative assumption of power asserted in this case has been delegated by the President or Congress is to say that they have authorized federal officers to do as they please. To place such unchannelled and ungoverned power in the hands of an official is itself an invalid delegation of authority.

III

Respondents' action is unconstitutional if authorized. The axe fell on Rachel Brawner without notice, without explication of what the security requirements constitute, without a statement of reasons particularizing the respects in which she allegedly failed to meet them, without an opportunity to answer, without presentation of the evidence against her, and without presentation of evidence on her behalf. The only alternative to saying that Rachel Brawner was denied due process is to say that she is entitled to none.

Respondents' action conflicts with the First Amendment as well as the Fifth. Under the regime of absolute governmental power manifest by this case the only safety of the citizen against official oppression—if he is safe even then—is to speak only banalities, to read or write only commonplaces, and to associate with none

about whom an eyebrow could be raised. Anything less than unrelieved anonymity exposes the individual to the risk of governmental condemnation as a security risk without even the right to know the why or the where, much less to defend. In this environment every value that the First Amendment is designed to protect against governmental abridgment would perish.

IV

Rachel Brawner was sufficiently injured by the unauthorized and unconstitutional action taken against her to complain. She lost her job as a cook which she had held for six and one-half years; however comparable any other job may be that she may secure elsewhere, she must start at that new employment with zero seniority, so that she has permanently lost the seniority protection drawn from six and one-half years' service; her employment opportunities generally have been sharply curtailed; and her reputation has been sullied. And so *Greene v. McElroy* cannot be distinguished upon the ground that William Greene was hurt but Rachel Brawner was not. Both suffered enough, and it is an almost insulting irrelevancy to ask who suffered more.

Nor can *Greene v. McElroy* be distinguished upon the ground that William Greene worked on private property while Rachel Brawner worked on federal property. Were this to make the difference it would follow that, had William Greene worked on federal property, his employment could have been destroyed and his reputation besmirched with no hearing at all, via the power to control access to governmental land. But it is not true that authorization for acts done by a governmental official is unnecessary if the acts are per-

formed on land owned and occupied by the sovereign. And it is not true that the Constitution stops at the entrance to a Navy installation. Federal ownership of the premises on which the Gun Factory is located does not mean that officials may destroy the employment and sully the name of persons working within the grounds. Within our scheme of limited powers, federal officers are not lords of the manor empowered to do as they will.

ARGUMENT

Respondents Acted Without Authority in Causing Petitioner Rachel M. Brawner to Lose Her Job at the Cafeteria, in Impairing Her Opportunity for Employment Elsewhere, and in Besmirching Her Reputation; if Authorized, the Action is Unconstitutional

I. INTRODUCTION; GREENE v. McELROY

The uncontroverted facts are stark and bare. Respondent Tyree, superintendent of the Naval Gun Factory, and Respondent Williams, security officer of the Naval Gun Factory, made a unilateral determination that Petitioner Rachel M. Brawner "does not meet . . . security requirements [for admission to the Gun Factory] and therefore entrance privileges to the Naval Gun Factory have been revoked" (*supra*, p. 13). In reaching this conclusion, no hearing was accorded Brawner, the officers taking the position that even a "meeting to discuss the action . . . would serve no useful purpose and is therefore unnecessary" (*supra*, p. 13). When Brawner's identification badge was turned over to the security officer, he gave no reason for his action, except to say he would not permit her to continue to retain the badge because her security status was in question. Neither before, then, nor there-

after did the security officer or any other official give any explanation for this conclusion to either Brawner, the Union, or the employer (*supra*, p. 8). Indeed, there was not even disclosure of what the security requirements constitute, much less particularization of the respects in which Brawner allegedly failed to meet them. As a result of this action, Brawner lost her job at the cafeteria, her opportunity for employment elsewhere was impaired, and her reputation was besmirched.

Respondents thus assert the authority, at least where the place of civilian nongovernmental employment is on federal property, to cause a civilian nongovernmental worker to lose her private employment on security grounds and otherwise injure her, without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to satisfy them, and without any hearing of any kind at which to know and meet the evidence supporting the conclusion. To stand, respondents' action must be supported by valid authority, for it is fundamental that no "Federal officer" may act "in excess of his authority or under an authority not validly conferred." *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620. Action in the name of security is no exception to the rule. *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 140. On the contrary, it is the occasion for its stringent application. This Court has invalidated a governmental employee's removal and debarment from federal employment on the ground of a reasonable doubt as to his loyalty because the action taken against him was in excess of the authority conferred by the relevant executive order. *Peters v. Hobby*, 349 U.S. 331; *Service v. Dulles*, 354 U.S. 363. It has stricken down

an executive order regulating retention of federal employment because the security standards prescribed by that order were not authorized by the relevant statute. *Cole v. Young*, 351 U.S. 536. It has ordered the reinstatement of a governmental employee to his job because his discharge for security reasons did not comply with the regulation pursuant to which it was effected. *Vitarelli v. Seaton*, 359 U.S. 535. And it has invalidated a private employee's revocation of security clearance, which caused him to lose his job, because the regulation on which it was based prescribed a procedure unauthorized by either legislative or executive sanction. *Greene v. McElroy*, 360 U.S. 474.

This Court has thus enjoined a tight test of authority in this field. It has firmly established that, if employment is to be governed by security requirements, the authority must be explicitly stated, and will not be enlarged upon by implication.¹⁴ Particularly in the field of loyalty and security, where a "‘badge of infamy’ attaches" to the affected employee and where "substantial rights affecting the lives and property of citizens are at stake" (*Peters v. Hobby*, 349 U.S. 331, 347), scrupulous confinement of federal officers to only such authority as is unambiguously conferred is required.

In this case this Court's decision in *Greene v. McElroy*, 360 U.S. 474, is the short answer to respondents' claim that their action was authorized. Rachel Brawner, like William Greene, was a private employee of a private employer. As explained in the Navy Civilian Personnel Instructions, quoted by respondents

¹⁴ Compare, in directly related contexts, *Harmon v. Brucker*, 355 U.S. 579, 581-583; *Kent v. Dulles*, 357 U.S. 116, 128-130.

in their brief below at pages 16-17, "The services operated by concessionaires are classed as private enterprises; they acquire none of the status of a government instrumentality and *their employees have the same legal status as do employees of any private employer.*" (Emphasis supplied.) This Court in *Greene v. McElroy* decided the status of an employee of a private employer whose employment was adversely affected by the Secretary of Defense or his subordinates on security grounds. It held that "in the absence of explicit authorization from either the President or Congress the respondents were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). Unlike William Greene who had at least a limited hearing, Rachel Brawner had no hearing at all; and unlike William Greene who did have access to classified information, Rachel Brawner had no access to classified information (*supra*, p. 9 and n. 6). Since a limited hearing was an unauthorized basis for causing an employee with access to classified information to lose his job "in the absence of *explicit authorization* from either the President or Congress," it follows *a fortiori* that neither the President nor Congress "specifically has decided" (*id.* at 507) to delegate the even more expansive prerogative of acting without any hearing at all with respect to an employee without any access to classified information.

Nevertheless, the court below held, as respondents claim, that "the authority dealing with entrance upon naval installations . . . is clear and ample" and sufficiently supports respondents' action (R, 163). We shall therefore show first that in this case respondents' conduct is devoid even of *departmental* authorization.

much less explicit executive or congressional sanction (*infra*, pp. 31-76). We shall next show that, if authorized, respondents' action is unconstitutional; it satisfied neither the prescript of rudimentary fair play ordained by the Fifth Amendment (*infra*, pp. 77-84), nor the right to speak, think, and associate freely prescribed by the First Amendment (*infra*, pp. 84-86). We shall finally show that respondents cannot escape answerability for their unauthorized and unconstitutional conduct by their claim that Rachel Brawner was not sufficiently injured by it (*infra*, pp. 87-97), nor by their claim that the governmental ownership of the land on which they acted absolutely licenses what they did (*infra*, pp. 97-103).

II. RESPONDENTS ACTED WITHOUT AUTHORITY

A. THE SECURITY PROGRAM IN PRIVATE EMPLOYMENT; INDUSTRIAL PERSONNEL SECURITY REVIEW REGULATION; EXECUTIVE ORDER NO. 10865; INDUSTRIAL PERSONNEL ACCESS AUTHORIZATION REVIEW REGULATION

1. The Industrial Personnel Security Review Regulation was in effect at the time of the action taken against Petitioner Rachel Brawner. Adopted on February 2, 1955, this regulation was promulgated by the Secretary of Defense upon the recommendation of the Secretaries of the Army, Navy, and Air Force, and it prescribed the procedures for the security clearance of persons in private employment. 32 CFR, 1960 Cum. Supp., Part 67. It was this regulation which was before this Court in *Greene v. McElroy*, 360 U.S. at 494, n. 23, and which this Court invalidated for want of executive or congressional authority to dispense with the safeguards of confrontation and cross-examination.

This regulation represented the *departmental* view of the limitations within which the Department of

Defense meant to regulate private employment upon the basis of security requirements. The Department undertook in this regulation to demarcate the area within which and the means by which it chose to have its officers act, and conduct by its officers which did not conform with the regulation was devoid of internal departmental authority. Accordingly, while the Department sought to go farther than its authority extended, its officers were at the least bound not to go beyond what the regulation prescribed. Viewed in this light, respondents in this case transgressed even the limitations of departmental authority, for they entered an area which the regulation had closed to them and they employed means which the regulation did not permit in the area which was open. Thus:

(a) The regulation confined the security program to private employers and private employees who have access to classified information. As Section 67.1-1 states: "This part prescribes the uniform standard and criteria for determining the eligibility of contractors, contractor employees, and certain other individuals as set forth herein, *to have access to classified defense information.*" (Emphasis supplied.) See also *id.* §§ 67.1-2(c), 67.1-6(a)(1-3).

Petitioner Rachel Brawner had no access to classified information (*supra*, p. 9 and n. 6).¹⁵ Under the

¹⁵ The attempt of the court below to suggest that Rachel Brawner may indeed have been privy to classified information is revealing. It states: "A naval installation such as a gun factory is in and of itself a confidential matter of highest priority, and many of its vital features are observable by anyone on the premises" (R. 160). This is a security concept which even the Department of the Navy disclaims. Section 0201 of the United States Navy Security Manual for Classified Matter states that: "An individual does not have access to classified matter by being in a place where

regulation person like Rachel Brawner who have no access to classified information are to be let alone. "The right to be let alone is indeed the beginning of all freedom."¹⁶ The regulation embodied this right vis-a-vis private employees who do not have access to classified information. Officers who disregard this right exceed their internal departmental authority.

(b) Even if the security program were applicable to Rachel Brawner—that is, even if she had access to classified information—it is plain that the procedures specified by the regulation to determine security clearance negative the power which respondents in this case presumed to exercise.

(i) Section 67.3-1 of the regulation provides that "Clearance shall be denied or revoked if it is deter-

such matter is kept, provided the security measures which are in effect prevent him from gaining knowledge of such classified matter." (Emphasis supplied.) We presume that respondents do not assert that the security measures at the Gun Factory are not adequate to keep a cook from acquiring information she should not have. But it would make no difference even if it were true that Rachel Brawner had access to classified information. For she would then be entitled at least to the safeguards of the regulation, which was itself defective because it dispensed with confrontation and cross-examination.

¹⁶ Mr. Justice Douglas dissenting in *Public Utilities Commission v. Pollak*, 343 U.S. 451, 467. See also, Mr. Justice Brandeis dissenting in *Olmstead v. United States*, 277 U.S. 438, 478: "The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

mined, on the basis of all the available information, that access to classified information by the person concerned is not clearly consistent with the interests of the national security.”¹⁷ Section 67.3-2 thereafter elaborates the criteria to be evaluated in making this determination. The regulation does not, as section 5(b) (iii) of the Food Services Concessionaire Agreement presumes to permit (*supra*, p. 5), authorize any federal officer to formulate his own undisclosed concept of “security requirements.”

(ii) Section 67.4-1 of the regulation provides that “activities of military departments *will not deny* a clearance to a contractor or a contractor employee, and *ordinarily will not suspend* a previously granted clearance,” except that, “in *exceptional cases* officials authorized by the military department concerned may suspend a clearance previously granted to a contractor employee . . . when, in the opinion of the authorized official, the contractor employee’s continued access to classified information, *pending action by the Screening Board, will constitute an immediate threat to the security interests of the United States.*” (Emphasis supplied.) Thus, the only summary power conferred upon a security officer is to suspend clearance where an *immediate threat to security* is involved, and even then his action is *interim only pending action* by the Screening Board. In this case, it could hardly be suggested that Rachel Brawner’s continued service as a short order cook constituted an immediate threat to the security interests of the United States. If it did, the regulation required further investigation and adjudication by others to secure a final determination

¹⁷ This section was modified in a presently immaterial way on April 30, 1959. 24 Fed. Reg. 3367.

of her status. The regulation conferred no authority upon a security officer to snuff out the economic life of any employee without more ado than his own say-so.

(iii) Except for the power of summary suspension pending action by the Screening Board where an immediate threat to security is concerned, a security officer's only authority is to "forward to the Director" of the Office of Industrial Personnel Security Review "all cases prescribed in paragraph (a) of 67.1-6, together with the complete file, including the recommendations in the case, the reasons therefor, and all other available information and material relevant to a determination in the case." § 67.4-2. The Director on receipt "will forward it to the Screening Board for appropriate action." *Ibid.* The Screening Board, after investigation and review, will either grant, continue, or suspend security clearance. § 67.4-3(a-e). "If the Screening Board concludes . . . that the case does not warrant a security finding favorable to the person concerned, it will prepare a Statement of Reasons. The Statement of Reasons will be as specific and in as great detail as, in the opinion of the Board, security considerations permit, in order to provide the person concerned with sufficient information to enable him to prepare his defense." § 67.4-3(e).

The person is afforded an opportunity to answer, to submit evidence, and, at his request, to have a hearing. § 67.4-3(f). If the person does not reply, his clearance is finally denied or revoked (§ 67.4-3(g)(3)); if he does reply but does not request a hearing, the file is transmitted either to the Hearing Board or to the Review Board for determination (§ 67.4-3(g)(2)); if he requests a hearing, the file is transmitted to the Exec-

utive Secretary of the Hearing Board (§ 67.4-3(g)(1)). A hearing will thereafter be held, "designed to accomplish two major purposes: (1) to permit the person concerned to present evidence in his own behalf and (2) to ascertain all the relevant facts in the case to aid in reaching a fair and impartial determination." § 67.4-5(a). It is said that "every possible safeguard within the limitations of national security will be provided to ensure that no contractor or no contractor employee will be denied a clearance without an opportunity for a fair hearing." § 67.1-3(a). The Hearing Board thereafter determines whether or not the granting of clearance is clearly consistent with the interests of the national security. § 67.4-6(e). The determination "shall include a finding with respect to each of the allegations set forth in the Statement of Reasons" and a "detailed discussion" of the evidence relied upon to support the finding. § 67.4-6(d). And in making the determination (§ 67.4-6(b)):

The Board will take into consideration the fact that the person concerned may have been handicapped in his defense by the non-disclosure to him of classified information or by his lack of opportunity to identify or cross-examine persons constituting sources of information. Accordingly, it will weigh each item of derogatory information carefully in the light of its recency and relative seriousness, the amount and quality of supporting evidence, the attendant circumstances, whether the item was given under oath or affirmation, whether or not it is relevant to the Statement of Reasons, and whether or not the person concerned has had an opportunity to rebut it.

The determination by the Hearing Board is in some circumstances final and in other circumstances sub-

ject to further consideration by the Review Board. § 67.4-7. The determination by the Review Board is itself subject to "Reversal by the Secretary of Defense, or reversal by the joint agreement of the Secretaries of the three military departments at the request of one of such Secretaries." § 67.4-8(c) (3).

The contrast between the authorized procedure for denying or revoking security clearance to a person in private employment and the action taken by respondents against Rachel Brawner could not be more glaring. Respondents in this case presumed to pronounce final judgment with no notice, no specification of charges, no opportunity to answer or be heard, and no standards. The First Annual Report of the Industrial Personnel Security Review Program discloses that about 60 percent of the cases referred by security officers result in the grant of clearances pursuant to the procedures prescribed by the regulation.¹⁸ There

¹⁸ First Annual Report, Industrial Personnel Security Review Program, 3 (1956):

To summarize the scope of operations, during the year beginning in July 1955 and ending July 31, 1956, 418 cases were considered under the program after being referred to the Director, Office of Industrial Personnel Security Review, by the three Services with a recommendation that clearance be denied or revoked. Of this number, after careful consideration, and after clarifying the available information where necessary, the Screening Board was able to conclude that a clearance should be issued in 250 cases.

In the remaining 168 cases, the Board concluded that a clearance was not warranted and issued a Statement of Reasons. The individuals concerned elected to default in 45 cases, and final denials were issued in accordance with the Regulation.

Fifty-one cases were decided by Board action during the year, and after careful examination in the Director's Office, 31 final denials were issued. Clearance of access to classified defense information was directed in the other 20 cases.

is no internal departmental authority licensing the security officer or the superintendent of the Gun Factory to make an *ex parte* determination which experience has shown results in a 60 percent incidence of error.

(iv) Denial of security clearance does not require discharge of a nongovernmental employee. Section 67.1-3(b) of the regulation provides that: "Since a clearance relates only to access to classified defense information, the denial or revocation of a clearance to a contractor or contractor employee does not preclude his participation in unclassified work." As stated in the First Annual Report, Industrial Personnel Security Review Program, 11-12 (1956):

One further area deserves mention in this report. Our experience over the past year indicates that a few Department of Defense contractors have been unnecessarily harsh in treating adverse decisions at any level as grounds for dismissal, rather than as a mandate to limit such an employee's access by transfer, another job, or in other ways.

The situation is complicated by the delicate position of the Department of Defense when it enters into the relations between a contractor and its employee, a matter in which the Department, although it has great concern, has no right to intrude itself.

We have at least an educational role to play under these circumstances, however, and we have taken steps to carry out that role. Conferences have been held between various segments of industry and Government officials interested in industrial security. These conferences, with their interchange of viewpoints, are useful and are being continued.

Education should begin closer at home.. In the light of a regulation which states that denial of clearance "does not preclude . . . participation in unclassified work," there cannot be the slightest departmental authority for causing Rachel Brawner to lose her job as a short order cook in a cafeteria.

2. Subsequent to this Court's invalidation of the Industrial Personnel Security Review Regulation, the President on February 20, 1960, issued Executive Order No. 10865, prescribing the procedure to be used in determining whether authorization for access to classified information should be denied or revoked. 25 Fed. Reg. 1583. By this order the President has required the Secretary of Defense and other enumerated department heads to afford the applicant a hearing, including with certain limitations "an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue . . ." (Sec. 4(a)). Thereafter, on July 28, 1960, pursuant to this executive order the Department of Defense promulgated the Industrial Personnel Access Authorization Review Regulation, and cancelled the Industrial Personnel Security Review Regulation. 25 Fed. Reg. 7523. The new regulation incorporates the limited requirement of cross-examination (Sec. IV(E)(2)), but does not otherwise materially alter the procedure prevailing under the preceding regulation.

3. The upshot is that the Department of Defense regulations, both preceding and following this Court's decision in *Greene v. McElroy*, accord a private employee with access to classified information at least a limited hearing to determine his security status when it is brought into question, and since *Greene v. McElroy* by executive requirement the hearing includes at least

a limited opportunity for cross-examination.¹⁹ Yet respondents in this case presumed to decide that Rachel Brawner did not meet the "security requirements" with no notice, no specification of reasons, no opportunity to answer or be heard, and no standards. And they assert this power to act summarily despite the fact that they concede that, had Rachel Brawner had access to classified information, she would have been entitled to these safeguards. For, in their opposition to certiorari, they state, referring to "civilians employed on military bases by private contractors" (p. 10), that "employees who, unlike petitioner, have access to classified information . . . generally come within the Industrial Security Program to which the *Greene* case

¹⁹ The limitations are significant and we do not suggest that the limited opportunity satisfies the right to confrontation and cross-examination. For example, the statement of a "confidential informant" may be received without cross-examination if the department head certifies that "disclosure of his identity would be substantially harmful to the national interest" (Executive Order No. 10865, 25 Fed. Reg. 1583, Sec. 4(a)(1)); and the statement of any person may be received without cross-examination if the department head or his designee determines that the statement is "reliable and material," that not to receive it would be "substantially harmful to the national security," and that "the person who furnished the information cannot appear to testify" due to unavailability or "some other cause determined by the department head to be good and sufficient" (Sec. 4(a)(2)). The right to confrontation and cross-examination means that the proponent of evidence must choose between full disclosure and not tendering it at all. *United States v. Coplon*, 185 F. 2d 629, 638 (C.A. 2), cert. denied, 342 U.S. 920; *In re Burke*, 87 Ariz. 336, 351 P. 2d 169, 172, *infra*, pp. 82-83. Nor is the department head's private determination a satisfactory alternative to full disclosure. "That a conclusion satisfies one's private conscience does not attest its reliability. . . . Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness." Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 171.

applied . . . " (p. 10, n. 8). Thus respondents denied Rachel Brawner, who had no access to classified information, even the safeguards of a limited hearing which they agree is vouchsafed to employees with access to classified information. It turns things upside down for respondents to assert, as they must and do, that they had departmental authority to accord no hearing to an employee who had no access to classified information, when by their own regulation they are required to accord at least a limited hearing to an employee with access to classified information. If any such distinction were intended, it is so indefensibly invidious as to constitute in itself a denial of the equal protection of law. The true teaching is that employees who do not have access to classified information are to be let alone.

To this all that the court below states is that the "case does not involve any Personnel Security Program, with its concomitant regulations" (R. 148). But the regulations are involved in the crucial sense that their purport is that employees not subject to its procedures are to be let alone. They are also vitally involved in that the summary action prohibited by the regulations as to employees covered by them cannot possibly be thought to be an authorized procedure as to employees not covered, particularly when the covered class does have access to classified information and the exempt class does not. To say that this case does not "involve" the regulations is like saying that a regulation which confines a fisherman to a daily catch of seven bass no less than ten inches long during the open season does not prohibit him from catching an unlimited number of bass of smaller size during the closed season.

B. STATUTORY PROTECTION OF FEDERAL GOVERNMENTAL EMPLOYMENT: THE ACT OF AUGUST 26, 1950; THE LLOYD-LA FOLLETTE ACT; AND THE VETERANS' PREFERENCE ACT

Rachel Brawner worked in private employment as a short order cook under a collective bargaining agreement which safeguarded her from discharge or suspension "without good and sufficient cause" (*supra*, p. 4). The equivalent to this status in governmental employment is a position within the competitive civil service. It is therefore pertinent to observe that, had Rachel Brawner worked in this equivalent status as a short order cook in the cafeteria of the Gun Factory as a governmental employee, respondents could not have summarily discharged her. And as the "liberty [of persons in private employment] to follow their chosen employment is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job" (*Parker v. Lester*, 227 F. 2d 708, 717 (C.A. 9)), it is impossible to imagine that respondents are authorized to act towards private employees of another in a manner which is not tolerated with respect to governmental employees.

Thus, as to civilian governmental employees, Congress has by statute (64 Stat. 476, 5 USC § 22-1) provided that the Secretary of the Navy, among other enumerated agency heads, may in the interest of national security suspend any civilian officer and employee, but with two important provisos. First:

Provided, That to the extent that such agency head determines that the interests of the national security permit, the employee concerned shall be notified of the reasons for his suspension and within thirty days after such notification any such person shall have an opportunity to submit any statements or affidavits to the official designated

by the head of the agency concerned to show why he should be reinstated or restored to duty. The agency head concerned may, following such investigation and review as he deems necessary, terminate the employment of such suspended civilian officer or employee whenever he shall determine such termination necessary or advisable in the interest of the national security of the United States, and such determination by the agency head concerned shall be conclusive and final.

And second:

Provided further. That any employee having a permanent or indefinite appointment, and having completed his probationary or trial period, who is a citizen of the United States whose employment is suspended under the authority of this Act, shall be given after his suspension and before his employment is terminated under the authority of this Act, (1) a written statement within thirty days after his suspension of the charges against him, which shall be subject to amendment within thirty days thereafter and which shall be stated as specifically as security considerations permit; (2) an opportunity within thirty days thereafter (plus an additional thirty days if the charges are amended) to answer such charges and to submit affidavits; (3) a hearing, at the employee's request, by a duly constituted agency authority for this purpose; (4) a review of his case by the agency head, or some official designated by him, before a decision adverse to the employee is made final; and (5) a written statement of the decision of the agency head.

This statute is applicable only to governmental employees who occupy "sensitive" positions affecting the "national security"; its authority does not extend to all positions. *Cole v. Young*, 351 U.S. 536.

Accordingly, as a governmental employee, Rachel Brawner could not have been summarily discharged under this statute for failing to meet "security requirements." First, it is hard to imagine a position less "sensitive" than that of short order cook, so that she would not be subject to suspension or discharge under the statute at all. Second, even if applicable, she would at the least have been entitled to notification of the reasons for suspension, an opportunity to submit statements or affidavits in response, and a decision based upon review of her response before the suspension was converted to a discharge. This minimum must be extended to *any* employee unless the "agency head determines that the interests of the national security" do not permit, and no such determination could in conscience be made in a situation like Rachel Brawner's. Third, were Rachel Brawner in the competitive civil service, she would be entitled to the additional enumerated procedural safeguards, including a hearing, before she was terminated.

This statute aside, as a governmental employee in the competitive civil service—the governmental equivalent to her protected private employment—Rachel Brawner's retention of employment would have been governed by the Lloyd-LaFollette Act.²⁰ She could not be removed or suspended "except for such cause as will promote the efficiency of such service and for reasons given in writing," and only upon compliance with the following procedure:

Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be

²⁰ § 6, 37 Stat. 555, as amended, 5 USC § 652.

allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay.

A summary discharge for an unparticularized failure to meet "security requirements" could not stand.²¹ And, were Rachel Brawner a veteran, she would have had the additional right of answering the charges "personally," with the right to appeal an adverse decision to the Civil Service Commission, including "the right to make a personal appearance" before the Commission.²²

These laws are not to be read as if they were a grudging exception to the spoils system. They embody a policy which is of the essence of personnel administration in the modern civil service. And so, when federal officers presume to act towards private employees in a way alien to the genius of the laws protecting governmental employees, the assertion of such authority is heavily suspect. For it is unthinkable that the Government through any of its organs would show less scrupulous concern to safeguard the interests of persons in private employment, towards whom it owes a duty to refrain from "illegal interference or compulsion" in the exercise of the "right to earn a livelihood and to continue in employment unmolested,"²³

²¹ E.g., *Mulligan v. Andrews*, 211 F. 2d 28 (C.A.D.C.).

²² Veterans' Preference Act, § 14, 58 Stat. 390, as amended, 5 USC § 863.

²³ *Truax v. Raich*, 239 U.S. 33, 38.

than it manifests towards its own employees, over whom it can assert plenary authority within constitutional limits.²⁴

C. THE ADMINISTRATIVE MATERIALS INVOKED BY RESPONDENTS TO SHOW AUTHORITY

We turn now to consider the material relied upon by respondents to show departmental authority for the action taken against Rachel Brawner.

1. The United States Navy Security Manual for Classified Matter

The United States Navy Security Manual For Classified Matter was promulgated on October 2, 1954.²⁵ Respondents invoke Chapter 14 of the manual, entitled "Visitor Control." The essence of their position is that Rachel Brawner is a "visitor" to the Gun Factory, and in accordance with Section 1409(1) of the manual, "The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted." We shall show that Rachel Brawner is not a "visitor" to the Gun Factory within the meaning of the "visitor control" procedure of Chapter 14, and that independently of Chapter 14, Chapter 15 of the manual, entitled "Personnel Security Investigations And Clearances For Access To Classified Matter," negatives the authority asserted by respondents to treat Rachel Brawner as if she were a "visitor."

²⁴ See *United Public Workers v. Mitchell*, 330 U.S. 75, 100.

²⁵ This manual was on March 10, 1958, superseded by another of the same name and substantially identical tenor. We assume that these manuals, and other administrative materials upon which respondents rely, will be made available in their entirety to the Court by respondents. None of the manuals or other materials are published in the Federal Register. See *infra*, pp. 58-65.

(a) To presume that the procedures for "Visitor Control" are applicable requires the assumption that Rachel Brawner is properly identified as a "visitor." Plainly she is not. For the full six and one-half years before her discharge on November 15, 1956, except for vacations, holidays, and very infrequent absences, Brawner worked everyday at the Bellevue Annex Cafeteria, Monday through Friday, from 6:00 a.m. to 3:00 p.m. (R. 6, 39-41, 90, 123). It is a perversion of language to describe her as a visitor or her attendance within the Gun Factory as a visit.²⁶

(b) The Gun Factory itself does not describe persons in Rachel Brawner's position as "visitors." Instead such a person is known as a "sponsored employee" (R. 67). The term "sponsored employee" distinguishes the person from a "Government employee" (*ibid.*). It refers to "people going to work in the Naval Gun Factory, . . . [as] in the restaurants or cafeterias, or the officers' mess, or the Navy Exchange Store . . . that employ civilians, but are not Government employees . . ." (*ibid.*). To identify Rachel Brawner as a sponsored employee, as the Gun Factory does, makes sense. But to refer to her as a "visitor", despite her everyday employment within the grounds for six and one-half years, is as senseless as it would be to refer to a similarly situated governmental employee as a "visitor."

(c) Section 1411 of the "Visitor Control" procedure, entitled "Escorting Visitors," discloses on its face that the procedure for visitor control has no application to

²⁶ Webster's New International Dictionary, Second Edition, Unabridged, defines visitor as "One who makes a visit; one who comes or goes to see a person or place, as for friendship, charity, sightseeing, etc."

a person regularly employed within the Gun Factory. It states that:

All visitors, except members of the United States Armed Services who have been properly cleared, shall be escorted. "Escorts" are responsible to commanding officers to assure that the visitor has access to only that information for which he has been authorized. When available, escorts shall be members of the naval service. If a member of the naval service is not available, a competent employee of the Naval Establishment may be designated.

If Rachel Brawner were truly a "visitor," she could not be present within the Gun Factory except if "escorted." Rachel Brawner has never been escorted. As she states in her uncontroverted affidavit (R. 122-123):

1. At no time during the full period of my employment at the Bellevue Annex Cafeteria of the Naval Gun Factory, when I came to work each morning, was I ever escorted by anyone from the gate of the Bellevue Annex to Building 65 (the place within the Annex where the cafeteria is located and where I worked). I was never escorted from Building 65 to the gate when I left work each afternoon. I had no escort at any time during any part of the day that I was within the Bellevue Annex.

2. At the time I first started working at the Annex, before the guards came to know me, upon approaching the gate in the morning to go to work, I placed my identification badge, which was suspended on a chain, about my neck. I walked through the gate without ever being stopped and proceeded directly to my place of work. The guard could observe the badge on me. He never inspected

it. After I became known to the guards, I didn't put the identification badge on, because the guards knew me and let me through just on seeing me.

The same thing happened when I left work in the afternoon. At first, I put the badge on me, but after the guards came to know me, that wasn't necessary.

At no time while I was working in the cafeteria did I wear the identification badge.²⁷

(d) A reading of the "Visitor Control" procedure as a whole shows that it has no application to persons like Rachel Brawner regularly employed within the Gun Factory. It is not geared to them. It has no rational relation to them. Indeed, Section 1402 states that "A visitor to a naval shore establishment is any person who is *not* attached to or employed by the command or staff using that station as headquarters." (Emphasis supplied.) While a person like Rachel Brawner is not employed by the command or staff, he would seem to be "attached to" it.

(e) Respondents invoke Section 1403 which, in categorizing visitors, enumerates "Personnel of private facilities under contract to the Department of Defense." The definition is not applicable. It pertains to contractor personnel who normally work on the premises of their employer located *away* from the naval establishment and who have occasion to come to the naval establishment in the course of the performance of the contract or for other reasons. This is

²⁷ Section 1407 of the 1958 manual, which supersedes the 1954 manual (*supra*, p. 46, n. 25), makes it discretionary rather than obligatory for the commanding officer to have visitors escorted. This change does not detract from the common sense of the type of person comprehended by the word visitor.

confirmed by Section 1415(2) of the 1958 manual, which supersedes the 1954 manual (*supra*, p. 46, n. 25). Entitled "Visits of Contractor Personnel," this section states that: "Department of Defense contractors desiring to have an employee visit an activity of the Naval Establishment involving access to classified information have been instructed to address a request in writing directly to the commanding officer of the activity to be visited."

(f) Independently of Chapter 14, which alone discloses the inapplicability of the visitor control procedure to Rachel Brawner, Chapter 15 of the manual, entitled "Personnel Security Investigations and Clearance For Access To Classified Matter," negatives any departmental authority to deprive a private employee of his job on security grounds without a hearing of any kind.

Section 1501(1) of the manual states that:

The Chief of Naval Operations (Director of Naval Intelligence), when requested by competent authority, shall be responsible for conducting security investigations of the following:

- a. Military and civilian personnel of the Naval Establishment.
- b. Private contractors and *contractors' employees* requiring access to classified matter. (*Refer to Armed Forces Industrial Security Regulation, OPNAV Instruction 5540.8.*) (Emphasis supplied.)

Section 1509, entitled "Investigation Requirements for Contractor Personnel," similarly states, "*Refer to Armed Forces Industrial Security Regulation, (OPNAV Instruction 5540.8).*" (Emphasis supplied.)

Rachel Brawner is within the class properly identified as "contractors' employees" or "Contractor Personnel." For "security investigations" of such employees, Sections 1501(1) and 1509 of the manual direct reference to the Armed Forces Industrial Security Regulation. This regulation may be found at 20 Fed. Reg. 6773.²⁸ Section 72.2-202(a) of the regulation provides that:

²⁸ Published on September 15, 1955, codification of this regulation was discontinued on April 30, 1956. 21 Fed. Reg. 2814. It was superseded apparently in February 1957 by another regulation of identical title and substantially the same purport. The new regulation is reported in 2 Gov't. Sec. & Loy. Rep. 25:4 (Feb. 1957). We have been unable to find it in the Federal Register. Section 2-202 of the new regulation corresponds to the section quoted in the text. The underscored part of the quoted section appears in identical form in the new section except for the addition of the word "military" before the words "clearing authority." The applicability of the Industrial Personnel Security Review Regulation is further confirmed by sections 2-203(f)(1) and 2-209 of the new regulation, as it was by corresponding sections 72.2-203(f)(1) and 72.2-209 of the old regulation.

However, another revision of this regulation, also not published in the Federal Register, was made apparently in April 1960. The sections cited in the preceding paragraph are unchanged, but a new section 2-209.1 has been added entitled "Denial of Admittance to Military Installations" which reads as follows (2 Gov't. Sec. & Loy. Rep. 25:37 (April 1960)):

The provisions of paragraph 2-111 [pertaining to denial and revocation of facility security clearances] and 2-209 [pertaining to denial and revocation of personnel security clearances] shall not be interpreted as modifying in any way the authority of the commander of a military activity to deny admittance of any individual to a military installation under his control. Actions taken under this paragraph are not appealable.

We are informed that the new section 2-209.1 was first promulgated on November 20, 1957. The action in this case had been begun on September 6, 1957 (R. 2).

Responsibility for effecting contractor personnel security clearances. (a) Those personnel security clearance actions required in connection with the granting of a facility security clearance (see § 72.2-107) shall be accomplished by the Military Department assigned security cognizance of the facility. Those additional personnel security clearance actions required in connection with a contract will be accomplished by the contracting Military Department, except those which are indicated herein to be accomplished by management. When the cognizant Military Department is different from the contracting Military Department, the cognizant Military Department shall forward the completed forms required for clearance to the security office of the contracting Military Department for processing. *The clearing authority shall complete all actions necessary for the granting of a personnel security clearance and will determine whether to grant the clearance or refer the case to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation.* Subject to the provisions of 72.2-209, any prior industrial security personnel clearance actions that may have been accomplished by any Military Department, provided these actions meet the standards prescribed in this part, shall not be duplicated, but shall be accepted by the Military Department effecting the personnel security clearance. [Emphasis supplied.]

Thus this regulation unambiguously requires that personnel security clearance of contractor's employees, if it is not to be granted, shall be referred "to the Director, Office of Industrial Personnel Security Review in accordance with the Industrial Personnel Security Review Regulation."

We have come full circle. The manual directs reference to the Armed Forces Industrial Security Review

Regulation. The latter directs reference to the Industrial Personnel Security Review Regulation. This regulation is exactly the one that we have heretofore considered at length (*supra*, pp. 31-39). And it directs that private employees who do not have access to classified information are to be let alone.

2. United States Navy Physical Security Manual

Respondents adduce another manual, this one entitled United States Navy Physical Security Manual, promulgated April 14, 1956. The apparent purpose of adducing this manual is to show that by its terms Rachel Brawner had the status of a "visitor" whom the Superintendent of the Gun Factory could exclude from the grounds at will. We now show that, upon any analysis of the definition of "visitor" in this manual, Rachel Brawner is not within the "visitor" class.

Section 0540 of this manual defines "visitor" as follows (p. 5-4):

- For the purpose of this manual, the term "visitor", in addition to its normal connotation, is defined as including employees and others who require infrequent access to security areas or one to whom permanent employee-type identification for such areas has not been issued.

The cafeteria in which Rachel Brawner worked is located in Building 65 of the Bellevue Annex of the Gun Factory (R. 39, 122). The applicability of the "visitor" definition to Rachel Brawner is based on the assumption that the whole of the Bellevue Annex of the Gun Factory constitutes a "security area." This assumption is negated by the manual and the record. The whole of the Annex is known either as a "Naval Activity" or a "Facility" (Secs. 0100(1) and (2), p.

1-3). Particular parts of the activity, based on their "vulnerability to the several elements comprising the security threat," are designated "critical areas" (Sec. 0320, p. 3-3). Certain "critical areas" are then designated as "restricted areas"; "A restricted area may be described as any critical area or place that requires control of access" (Sec. 0321, p. 3-4). In their turn "Restricted areas may be divided into three basic classifications, namely, *security areas*, off-limits areas and safety areas" (*ibid.*, emphasis supplied). In their answers to interrogatories, respondents admit that Rachel Brawner had no authorized "access to any of the *restricted areas* on the premises of the Naval Gun Factory" (R. 99, emphasis supplied). Since Brawner had no access to "restricted areas," she of course had no access to "security areas," these being but a classification within the genus "restricted areas." Hence, the definition of "visitor" in this manual, based on "access to security areas," has no application to Brawner.

Secondly, even if the whole of the Bellevue Annex be deemed a "security area," the definition is still inapplicable to Brawner. For a visitor is one who requires "*infrequent* access to security areas *or* one to whom permanent employee-type identification for such areas has *not* been issued" (emphasis supplied). Brawner's everyday employment within the grounds for six and one-half years can hardly be described as "infrequent," and since she did have an identification badge, she is not "one to whom permanent employee-type identification for such areas has *not* been issued."

Respondents in the court below skipped over the definition of "visitor" and quoted instead from parts

(b) and (c) of Section 0542 (pp. 5-5, 5-6), as follows (res. br. below, p. 16):

b. Employees performing work at regular or irregular intervals and for a short working period within a security area should be handled by the same procedure adopted for the control of visitors.

c. Employees performing continuous service for the activity within a security area should be handled by the same procedure adopted for regular activity personnel.

The threshold objection to the applicability of either (b) or (c) is the baseless assumption, already discussed, that Brawner does have access to a security area. Furthermore, part (b) cannot in any event apply, for it relates to employees working at "intervals"—"regular or irregular"—"for a short working period," a description which beyond peradventure excludes Brawner's everyday employment for six and one-half years. And since it does exclude continuous employment, it excludes application to Brawner of "the same procedure adopted for the control of visitors," and constitutes further confirmation of the inapplicability of the "visitor" classification to Brawner.

As to part (c), except for its reference to work "within a security area," its language is appropriate to describe employees like Brawner, for it refers to "Employees performing continuous service for the activity. . . ." But such employees, part (c) goes on to say, "should be handled by the same procedure adopted for regular activity personnel." The procedure applicable to "regular activity personnel" with access to classified information employed by private contractors

is defined by the former Industrial Personnel Security Review Regulation and by the present Industrial Personnel Access Authorization Review Regulation (*supra*, pp. 31-41). The procedure of either is the antithesis of what respondents did here. Certain it is that respondents have not shown that the "procedure adopted for regular activity personnel" authorizes their action here.

Finally, parts (b) and (c), as part (a), are introduced by the statement "Contractor's employees performing work in a security area should be provided with and be required to wear a distinctive badge". (See. 0542, p. 5-5). This simply requires that a badge be provided and worn. It serves the function of identification only. As Section 0570 (p. 5-7) seems to imply, the determination of security clearance is independent of the grant of a badge as a mere identification device.

3. Section 0734 of the United States Navy Regulations

Respondents invoke Section 0734 of the United States Navy Regulations (R. 114). This section provides that:

In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

1. To conduct public business.
2. To transact specific private business with individuals at the request of the latter.
3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command.

Presumably respondents would draw from this regulation the investiture of blanket authority in the com-

manding officer to control admission of dealers, tradesmen, or their agents. First of all, the words "dealer's agents" or "tradesmen's agents" are hardly apt descriptions of employees like Rachel Brawner. Second, even if they are, whatever blanket authority might otherwise be drawn from this regulation has been cabined by the other regulations to which we have already adverted. These other regulations, specific as to subject and detailed as to procedure, govern the generality of this regulation.

4. Other Indicia of Lack of Departmental Authority

Consideration of three additional factors further shows lack of departmental authority.

(a) The superintendent of the Gun Factory did not contemporaneously rely, in explanation of the authority for his action against Rachel Brawner, upon the manuals and Navy Regulations which respondents invoke. On the contrary, he explicitly stated, in answer to an inquiry as to the "statute, executive order, departmental regulation, and/or other basis" upon which he relied (R. 31), that he acted pursuant to Section 5(b) (iii) of the Food Services Concessionaire Agreement (R. 32-33, 59-60). Surely if the purported sources of authority later tendered after commencement of the suit were in fact in point, the superintendent would have known of them and invoked them. And, as we later show and as respondents did not challenge in the courts below, the Concessionaire Agreement does not constitute a valid source of authority (*infra*, pp. 65-68).

(b) Whenever the Federal Government through any of its organs has in fact intended to control employ-

ment, either public or private, on the basis of security requirements, it has manifested its intention unequivocally, whether by statute, executive order, or regulation. This is true of governmental employment (materials cited in *Cole v. Young*, 351 U.S. 536), private employment (materials cited in *Greene v. McElroy*, 360 U.S. 474), shipment as a merchant seaman (materials cited in *Parker v. Lester*, 227 F. 2d 708 (C.A. 9)), and public and private employment within the scope of the security program of the Atomic Energy Commission (10 CFR, Part 4). It has never been content with the anonymities which respondents invoke in this case. It has always published, as it has not here (*infra*, pp. 58-65), the relevant documents in the Federal Register, whether these were an executive order or a regulation. And the content of the documents has never been such that it was necessary to guess that their meaning was directed to controlling employment on the basis of security requirements.

(c) As we have said (*supra*, p. 29), this Court has firmly established the rule that, if employment is to be governed by security requirements, the authority must be explicitly stated, and will not be enlarged upon by implication. The purported sources of departmental authority tendered by respondents do not begin to meet the tight test of authority enjoined by this Court.

D. THE PUBLICATION REQUIREMENT OF SECTION 3(a) OF THE ADMINISTRATIVE PROCEDURE ACT

The administrative materials invoked by respondents to establish departmental authority were not published in the Federal Register. In the absence of publication, reliance upon the materials to show authorization is precluded, even if they otherwise sufficed.

1. Section 3(a) of the Administrative Procedure Act²⁹ states explicitly that:

Every agency shall separately state and currently publish in the Federal Register (1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests; (2) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal or informal procedures available as well as forms and instructions as to the scope and contents of all papers, reports, or examinations; and (3) substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law. No person shall in any manner be required to resort to organization or procedure not so published.

Unless within an exemption, there is no question but that the materials invoked by respondents are within the class whose publication is required. Indeed, the failure to publish them exemplifies the mischief at which the publication requirement was directed. A procedure for visitor control is asserted, vitally affecting the interests of the citizenry, but none can know of it or by diligent search uncover it until it is disclosed for the first time in the course of a lawsuit. The questions put by Mr. Justice Brandeis, during oral argument in *Pandma Refining Co. v. Ryan*, 293 U.S. 388, might well be asked here (Mason, *Brandeis, A Free Man's Life*, 618 (1946)):

²⁹ 60 Stat. 237, 5 USC § 1001.

The New Deal was introduced to the Court under most inauspicious circumstances, December 10, 1934, when government attorneys argued on behalf of the validity of certain orders of the President issued under NIRA [National Industrial Recovery Act] which purported to authorize him to prohibit the transportation in interstate commerce of "hot oil", i.e., of oil produced in violation of state government laws. Counsel in opposition complained that their client was arrested, indicted, and held in jail several days for violating a law that did not exist. The client said he had seen only one copy of the code and that was in the "hip pocket of a government agent sent down to Texas from Washington." Brandeis was immediately aroused. Here, surely, was proof of what happens when bigness afflicts government.

"Who promulgates these orders and codes that have the force of law?" the Justice asked.

"They are promulgated by the President, and I assume they are on the record at the State Department," the government's attorney replied.

"Is there any official or general publication of these executive orders?"

"Not that I know of."

"Well, is there any way," Brandeis pursued, "by which one can find out what is in these executive orders when they are issued?"

"I think it would be rather difficult, but it is possible to get certified copies of the executive orders and codes from NRA [National Recovery Administration]," government counsel replied somewhat lamely.

The Federal Register system had its origin in the need uncovered during the argument in *Panama Refining Co. v. Ryan* for public information of the content of laws

spewed from executive desks.³⁰ Section 3 of the Administrative Procedure Act brought to fruition the right of the public to know by making it the positive obligation of the agency to publish its organization, procedures, and substantive rules.³¹

2. To excuse failure to publish, respondents contended in the court below that the materials invoked by them were exempt from publication. Of the two exemptions urged by respondents, the court below adopted one and added another *sua sponte*.

(a) Respondents urged that Section 4 of the Administrative procedure Act exempted from the ruling making procedure prescribed by that section "any . . . naval . . . function of the United States. . . ." This is beside the point. Exemption from the rule making procedure is not exemption from the separate obligation to publish independently required by Section 3(a). The court below did not adopt this contention.

(b) Respondents urged that their materials were within the exemption expressed in the introductory clause of Section 3 excluding from the obligation to publish "any matter relating solely to the internal management of an agency. . . ." The short answer is that interference with the employment of a private employee of a private employer does not relate "solely" to the internal management of the agency. This exemption is to apply where "only internal

³⁰ 1 Davis, Admin. L. Treatise, 392-393 (1958).

³¹ Legislative History, Administrative Procedure Act. S. Doc. No. 248, 79th Cong., 2d Sess., 15-16, 194, 198, 255-256, 356-357; Final Report, Att'y. Gen. Com. Admin. Proc., S. Doc. No. 8, 77th Cong., 1st Sess., 25-29.

agency 'housekeeping' arrangements are involved";³² the exception is to be strictly construed³³ and is not "operative unless the excepted subject matter is clearly and directly involved."³⁴ In holding that this exception was nevertheless applicable, the court below stated that the "public effect is remote" (R. 153). If a private employee's loss of his job is a "remote effect," it is hard to imagine what is not. To subject a citizen to the loss of his job, and to brand him as a security risk in the process, cannot be dismissed as a housekeeping detail related "solely" to internal management.

(c) As the legislative history shows (notes 33 and 34, *supra*), the requirement that the exception is to be strictly construed and is not "operative unless the excepted subject matter is clearly and directly involved" is applicable also to the additional exemption of "any function of the United States requiring secrecy in the public interest." Invoking this exception *sua sponte*, the court below holds that, in their application to the Naval Gun Factory, the administrative materials relied upon by respondents are excluded by it from the obligation to publish (R. 152).

The court below is at pains to limit its holding to the Gun Factory. It states that, "Certainly the operation of an agency for the design, planning, and production of naval guns and other ordnance is a function requiring secrecy in the public interest. . . . Therefore, in so far as these regulations apply to the Naval Gun Factory, they need not be published to establish their

³² Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 194.

³³ *Id.* at 198, 255.

³⁴ *Id.* at 255.

validity. We are not concerned with their validity in any other application" (R. 152). The attempted bifurcation is fallacious. One and the same regulation must be either published or not published. It cannot be subject to the obligation to publish in one situation but not in another. If it is granted that there are situations in which its publication is required in order to privilege its application and that its application is intended in such situations, there cannot be any claim that its contents should be secret in any situation. Once it is published it is disclosed. In short, the court below cannot, as to one and the same regulation, divide the obligation to publish. The ink cannot be visible in one application of the regulation but invisible in another.

But the objection to the court's holding is more fundamental. The issue is not, as the court below seems to think, whether plans for the production of ordnance should be published. The question is whether the contents of the unpublished materials require "secrecy in the public interest." And the short answer is that none of the administrative materials invoked by respondents contain anything secret. The manuals are not even classified confidential. The method which the manuals describe for safeguarding classified information spell out a standard operating procedure which is general in character and altogether nonsecret in content. The court below makes the mistake of thinking that a description of a method for keeping secrets is itself secret. And the consuming but erroneous concept of the court below is that because a function is military it must be secret.

In explaining the exclusion from the obligation to publish of "any function of the United States requir-

ing secrecy in the public interest," the House Report stated that, "'Public interest' means manifest need in order to achieve the due execution of authorized functions."³⁵ Publication of the materials relied upon by respondents would not in the least hamper the Gun Factory's "due execution of authorized functions." The limited scope of the exception is also revealed by the definition of "Agency" in Section 2(a) of the Administrative Procedure Act. It states in part that, "*Except as to the requirement of Section 3, there shall be excluded from the operation of this Act . . . (2) courts martial and military commissions, (3) military or naval authority exercised in the field in time of war or in occupied territory. . . .*" (Emphasis supplied.) Thus, "It should be noted," as the Senate Report explained, "that even war functions are not exempted from the public information requirement of section 3."³⁶ Since "naval authority exercised in the field in time of war" is not exempt from the obligation to publish, it is plain that nothing in the exception of functions "requiring secrecy in the public interest" extends to administrative materials describing standard operating procedure generally applicable throughout the Navy Department. It is therefore not surprising that, although invoked by the court below *sua sponte*, respondents did not themselves urge the applicability of this exception.

3. The concluding sentence of Section 3(a) of the Administrative Procedure Act provides that: "No person shall in any manner be required to resort to or-

³⁵ Legislative History, Administrative Procedure Act, S. Doc. No. 248, 79th Cong., 2d Sess., 255.

³⁶ *Id.* at 196, and see, at 253.

ganization or procedure not so published." Writing for the Court of Appeals for the Second Circuit, Judge Learned Hand stated that, "We read the language . . . as including not only affirmative resort, but also any subjection to unpublished procedure." *Columbia Research Corp. v. Schaffer*, 256 F. 2d 677, 680 (C.A. 2). Invocation of an unpublished procedure subjecting a private employee to loss of his job and besmirchment of his name is thus invalid. If a private employee is indeed to be placed in that position of peril, the public information requirement of Section 3(a) means that he shall at least have advance notice of his vulnerability.

E. NO AUTHORITY CONFERRED BY THE FOOD SERVICES CONCESSIONAIRE AGREEMENT

In causing Rachel Brawner to lose her job, the superintendent of the Gun Factory invoked that provision of the Food Services Concessionaire Agreement by which the employer had contracted not to "engage, or continue to engage, for operations under this Agreement, personnel who . . . fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity" (R. 6, 32-33, 59-60, 62-63, 68-69). Although this was the contemporaneous basis for the action taken, in the courts below respondents abandoned reliance upon the Concessionaire Agreement as a source of authority. As we now show, the agreement could not authorize or validate respondents' conduct.

Authority which does not exist in the absence of the Concessionaire Agreement cannot be conferred by the agreement. Lack of authority is not overcome because respondents have contracted in advance to re-

quire another to do an act which they have no right to demand. The private employer can be no source of authority for action taken by respondents. All that the agreement with the private employer manifests is the employer's acquiescence in respondents' demand. But authority to execute or require performance of the agreement must be derived from a source other than the agreement; and as such authority does not independently exist, action pursuant to the agreement is no more valid than action pursuant to an executive order in conflict with a statute, or a statute in conflict with the Constitution. Positing just such a case as this, A. A. Berle, Jr., wrote (Berle, *The 20th Century Capitalist Revolution*, 96, 99 (1954)):

Without such authority, the Federal Government has no more right to demand that the General Electric discharge the three men than you or I might have. Nor can it enlarge its powers by any form of contract it may exact from General Electric or any other corporation. All it can do by that is to get General Electric into trouble.

* * *

This would seem to be the position of a corporation which discharges men in conformity with a clause in a government contract—if it be found that the direction given to it by the government agency was given without valid authority, or that the procedure in applying it violated due process of law.

All that the agreement does is to reduce to writing the arrogation of authority never conferred.³⁷

³⁷ Furthermore, the lack of authority to enter into Section 5(b) (iii) of the Concessionaire Agreement is further demonstrated by the Department of Defense regulation reported in 32 CFR,

Furthermore, Section 5(b) of the Concessionaire Agreement, insofar as it purports to affect the wages, hours, and working conditions of the employees whom the Union represents, is in any event invalid because in conflict with the National Labor Relations Act.³⁸ The National Labor Relations Board certified, and the collective bargaining agreement recognizes, the Union as the exclusive bargaining representative of the employees working in the cafeterias operated at the Gun Factory (*supra*, p. 3). Section 9(a) of the National Labor Relations Act provides that:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the *exclusive representative* of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . . [Emphasis supplied.]

"The National Labor Relations Act makes it the duty of the employer to bargain collectively with chosen representative of his employees. The obligation being exclusive, . . . it exacts 'the negative duty to treat with no other.' " *Medo Photo Supply Corp. v. National Labor Relations Board*, 321 U.S. 678, 683-684 (emphasis sup-

1960 Cum. Supp., 7.104-12. That regulation sets forth the form of "Military Security Requirements" clause which is to be inserted "in all contracts which are classified by a Department as 'Confidential,' including 'Confidential—Modified Handling Authorized,' or higher and in any other contracts the performance of which will require access to such classified information or material. . . ." There is no resemblance between the required clause and Section 5(b) (iii) of the Food Services Concessionaire Agreement.

³⁸ 49 Stat. 449 (1935), as amended, 29 U.S.C. §§ 151-68 (1952).

plied).³⁹ And, of course, "collective bargaining extends to matters involving discharge actions. . . ." *Inland Steel Co. v. National Labor Relations Board*, 170 F. 2d 247, 252 (C.A. 7) cert. denied, 336 U.S. 960.

In this case by contracting with the Board of Governors of the Naval Gun Factory to discharge employees who allegedly fail to meet the standards prescribed by Section 5(b) of the Food Services Concessionaire Agreement, the employer violated its statutory duty "to treat with no other" than the Union "in respect to rates of pay, wages, hours of employment, or other conditions of employment." A contract which is the product of an employer's violation of his statutory duty is invalid.⁴⁰ Without the Union's concurrence in it,⁴¹ no contract between the employer and a third party which affects wages, hours, or working conditions can bind the Union or the employees it represents. Section 5(b) of the Food Services Concessionaire Agreement, insofar as it is sought to be applied in this case, falls as a result of its incompatibility with the National Labor Relations Act.

³⁹ See also, *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332; *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342; *May Dep't. Stores v. National Labor Relations Board*, 326 U.S. 376, 384; *Ford Motor Co. v. Huffman*, 345 U.S. 330, 336-340; *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 200; *Graham v. Brotherhood of Locomotive Firemen & Enginemen*, 338 U.S. 232, 238; *Conley v. Gibson*, 355 U.S. 41, 46.

⁴⁰ *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 337; *National Licorice Co. v. National Labor Relations Board*, 309 U.S. 350, 364; *Local 1976, United Brotherhood of Carpenters v. National Labor Relations Board*, 357 U.S. 93, 106.

⁴¹ Not only has the Union never concurred in Section 5(b) of the Company's agreement with the Board of Governors, it did not even know of the existence of this agreement until it was uncovered in this case (R. 14, 48-49).

F. LACK OF EXECUTIVE OR CONGRESSIONAL SANCTION

We have shown that there is no departmental authority for the action taken by respondents. But even if departmental authority existed, it would not suffice as a valid source of authority in the absence of underlying executive or congressional sanction to support the administrative assumption of power. That is the teaching of *Greene v. McElroy*, 360 U.S. 474. This Court invalidated a regulation for want of "explicit authorization from either the President or Congress" empowering administrative deprivation of a private employee's job on security grounds "in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508, emphasis supplied). *A fortiori*, in this case, neither the President nor Congress "specifically has decided" (*id.* at 507) to delegate the even more expansive prerogative of acting without any hearing at all.

1. No executive authorization is claimed or exists. On the contrary, since *Greene v. McElroy*, on February 20, 1960, by Executive Order No. 10865, in determining whether authorization for access to classified information should be denied or revoked, the President has required the Secretary of Defense and other enumerated department heads to afford the applicant a hearing, including with certain limitations "an opportunity to cross-examine persons who have made oral or written statements adverse to the applicant relating to a controverted issue. . . ." 25 Fed. Reg. 1583, Sec. 4(a), *supra*, p. 39. As the President has enjoined a hearing, including a limited opportunity for cross-examination, on behalf of employees with access to classified information, it is hardly likely that he has authorized the

taking of wholly summary action against employees with no access to classified information.⁴²

2. Nor has Congress authorized the exercise of summary power. On the contrary, the statutes urged in this case to establish authority to act without any hearing at all are less substantial than the statutes which in *Greene v. McElroy* were held not to establish authority to act on the basis of a limited hearing. "Explicit authorization" to act altogether summarily is surely lacking.

(a) Respondents invoke 62 Stat. 765, 18 USC § 1382. It provides *inter alia* that "Whoever reenters or is found" within any naval installation "after having been removed therefrom or ordered not to reenter by any officer or person in command thereof" shall be punishable by a \$500 fine or six months imprisonment or both.⁴³ The duty not to reenter the installation after being ordered from it is hardly determinative of the

⁴² If he had, a grave question would be presented, independently of the First and Fifth Amendments (*infra*, pp. 77-86), whether such authorization would be consistent with the limitations upon the exercise of executive power. The "right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . ." *Greene v. McElroy*, 360 U.S. 474, 492. See also, *Railway Employees' Dept. v. Hanson*, 341 U.S. 225, 234. If that right "is to be regulated, it must be pursuant to the law-making functions of Congress." *Kent v. Dulles*, 357 U.S. 116, 129. See also, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579.

⁴³ The first part of this statute clearly has no applicability. It pertains to "whoever . . . goes upon any . . . naval . . . installation, for any purpose prohibited by law or lawful regulation." There is no question here of entry for a prohibited purpose. The difference between the two parts is construed in *Holdridge v. United States*, 282 F. 2d 302, 308-309 (C.A. 8).

question whether the original ouster was authorized. It is no more so than is the duty to obey a judicial decree during the pendency of a proceeding to ascertain its validity determinative of the court's jurisdiction to enter the decree in the first instance. *United States v. United Mine Workers*, 330 U.S. 258, 289-295, 307-312. The statute does not imply more than it says, namely, reentry after removal is criminal. Does the statute thereby authorize the officer to use unnecessary force in effecting the removal? The statute surely does not constitute "explicit authorization" to cause an employee to lose his job on security grounds without any hearing or process of any kind.

(b) Respondents invoke 64 Stat. 1005, 50 USC § 797. This statute provides in part that:

(a) Whoever willfully shall violate any such regulation or order as, pursuant to lawful authority, shall be or has been promulgated or approved by the Secretary of Defense, or by any military commander designated by the Secretary of Defense, . . . for the protection or security of . . . property or places subject to the jurisdiction, administration, or in the custody of the Department of Defense, . . . relating to . . . the ingress thereto or egress or removal of persons therefrom, . . . shall be guilty of a misdemeanor. . . .

(b) Every such regulation or order shall be posted in conspicuous and appropriate places.

This statute is plainly inapplicable. It pertains to the willful violation of any regulation or order issued "pursuant to lawful authority." The very question in this case is whether "lawful authority" exists for the action taken. Furthermore, part (b) of the statute provides that "Every such regulation or order shall be

posted in conspicuous and appropriate places." There is no showing that any of the administrative materials upon which respondents rely were posted in conspicuous and appropriate places, and by their very character they would not and could not be. None of them, therefore, derive from any authority conferred by this statute. Indeed, Department of Defense Directive 5200.8 (R, 119-122), which administratively implements this statute, provides in part that: "Regulations issued pursuant hereto shall be posted in a conspicuous and appropriate place, and shall make appropriate citation of this designation and the Public Law under which the designation is made" (R. 122). None of the administrative materials adduced by respondents were issued "pursuant hereto."

(c) Respondents invoke 5 USC § 22, providing that:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. This section does not authorize withholding information from the public or limiting the availability of records to the public.

To this is added 10 USC § 5031, providing that the "Secretary of the Navy has custody and charge of all books, records, and other property of the Department," and 10 USC § 6011, providing that "United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President."

One may say of these statutes, as this Court said in *Greene v. McElroy*, 360 U.S. 474, 503, of the National Security Act of 1947, as amended, 5 USC §§ 171

et seq., "That Act created the Department of Defense and gave to the Secretary of Defense and the Secretaries of the armed services the authority to administer their departments. Nowhere in the Act, or its amendments, is there found specific authority to create a clearance program similar to the one now in effect."

Specifically as to 5 USC § 22, authorizing a department head to prescribe regulations for the government of his department, the court below in *Greene v. McElroy* disclaimed reliance upon it as a source of authority (254 F. 2d 944, 949), and this Court did not mention it. It is indeed but a housekeeping statute. Its limited scope is revealed by the sentence added to it on August 12, 1958: "This section does not authorize withholding information from the public or limiting the availability of records to the public." P.L. 85-619, 72 Stat. 547. The House Report in explaining this addition illuminates the modest role which Congress attributes to this statute (H. Rep. No. 1461, 85th Cong., 2d Sess., 1, 2, 7):⁴⁴

This bill would return section 22 of title 5 of the United States Code to what appears to have been the original purpose for which it was enacted in 1789. * * *

The law has been called an office "housekeeping" statute, enacted to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents. * * *

When Congress has determined that a specific area of information must be closed to the public, legislation has been enacted accomplishing this purpose. The laws are legion which limit the

⁴⁴ See also, S. Rep. No. 1621, 85th Cong., 2d Sess.

public's right to know—income tax laws, for example, and those covering crop reports, trade secrets, inventions, and military matters.

Where Congress has not acted, the executive officials have gradually moved in over the years. The "housekeeping" statute (5 USC 22) has become a convenient blanket to hide anything which Congress may have neglected or refused to include under specific secrecy laws.

* * *

Impartial witnesses gave the subcommittee clear-cut statements that title 5, United States Code, section 22, was never intended, either by Congress or the courts, to be anything other than a "housekeeping" statute.

A housekeeping statute does not constitute "explicit authorization" to cause the summary loss of a private employee's job on security grounds without any hearing or process of any kind.

3. To say that the administrative assumption of power asserted in this case has been delegated by the President or Congress is to say that they have authorized federal officers to do as they please. "No standards are specified No criteria are available. . . ."⁴⁵ Respondents are bound by nothing but their uncontrolled will. To place such unchanneled and ungoverned power in the hands of an official is itself an invalid delegation of authority. For a matter cannot be left to a subordinate "without standard or rule, to be dealt with as he pleased."⁴⁶ Delegation of such

⁴⁵ *Pederson v. Benson*, 255 F. 2d 524, 527 (C.A.D.C.).

⁴⁶ *Panama Refining Co. v. Ryan*, 293 U.S. 388, 418.

power is fatally defective for standards must exist "adequate to pass scrutiny by the accepted tests."⁴⁷

4. The court below enumerates the power which the Constitution invests in the Congress "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States" (Art. IV, § 3, cl. 2); to "exercise exclusive legislation in all cases whatsoever, over such district . . . as may . . . become the seat of the government of the United States" (Art. I, § 8 cl. 17); to "provide and maintain a navy" (Art. I, § 8, cl. 13); and to "make rules for the government and regulation of the land and naval forces" (Art. I, § 8, cl. 14) (R.-148). These and other provisions are sources from which Congress might derive constitutional power to legislate upon the subject. They do not by their own force in the absence of implementing legislation authorize any conduct. The point in this case is that Congress has not authorized respondents to act as they did, and it is bootless to suggest that Congress perchance has the power to do so if it would but exercise it.

And it bears remembering that the constitutional provisions enumerated by the court below must be matched against the words of the Fifth Amendment that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . .," and the words of the First Amendment that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ." As we presently show, had Congress in fact authorized the exercise of the powers asserted by respondents, it could not survive the prohibitions of

⁴⁷ *Kent v. Dulles*, 357 U.S. 116, 129.

the Fifth and First Amendments (*infra*, pp. 77-86). At the least the doubts are grave. This is relevant to the question whether the authorization asserted has been granted. . For it is elementary that that construction is to be adopted which avoids constitutional doubts.⁴⁸

5. Perhaps as good a demonstration of respondents' lack of authority is their answer to the interrogatory directed to this question. Respondents were asked to "state in detail the authority by which you support the action taken by you" (R. 98). Their answer to this interrogatory is that (R. 100):

This interrogatory calls for a conclusion of law which defendants are not required to answer, however the defendants refer the plaintiffs to the following.

The United States Constitution.

The United States Code and United States Statutes at large.

United States Navy Regulations, 1948, as amended.

United States Navy Security Manual for Classified Information.

This contemptuous and arrogant response is characteristic of respondents' highhanded action. It bespeaks manifest disregard for authority rather than scrupulous concern to stay within its bounds.

⁴⁸ *United States v. Rumley*, 345 U.S. 41, 45-46; *Peters v. Hobby*, 349 U.S. 331, 338; *United States ex rel. Attorney General v. Delaware and Hudson Co.*, 213 U.S. 366, 408.

III. RESPONDENTS' ACTION IS UNCONSTITUTIONAL IF AUTHORIZED

In the name of security respondents assert the power to cause Rachel Brawner to lose her job, to impair her employment opportunities, and to besmirch her reputation. In the name of security they assert the power to find that Rachel Brawner fails to meet "security requirements," without any explication of what the security requirements constitute, without any statement of reasons explaining the ultimate conclusion that the employee fails to satisfy them, and without any hearing of any kind at which to know and meet the evidence supporting the conclusion. This total subjugation of the security of the citizen in the name of the security of the state shocks a civilized conscience. It offends the guarantees of the Fifth and First Amendments.

A. FIFTH AMENDMENT

The Fifth Amendment requires fair play. Obedience to the say-so of a security officer, with no opportunity to defend or be heard, is at war with fair play. This much seemed to be conceded by the Solicitor General in oral argument in *Greene v. McElroy*. In a colloquy with Mr. Justice Harlan, he agreed that at least some hearing was indispensable to satisfy the prerequisites of due process (27 U.S. Law Week 3275, 3277-78, April 7, 1959):

Mr. Justice Harlan: "Is it your position that the government would have the right to discharge employees without a hearing?"

[Solicitor General:] "The Wieman case, 344 U.S. 183, presents a problem there. Under that case, the standard cannot be irrational. But here the basic question is whether the man has a right to government secrets as a matter of due process.

The ultimate question is, if the government has a hearing and has information of a confidential character from an undercover agent and that person has seen the employee actively participating in a Communist cell, is this Court going to tell the government that it must disregard such information."

* * *

Mr. Justice Harlan: "What you are saying in effect is that due process is satisfied if the agency gives the employee an opportunity to be heard in his defense. Could the government discharge him without a hearing?"

"It might be so irrational that it couldn't be done."

"Then due process requires some kind of a hearing?"

"Yes. A process of balancing is involved."

"Then the government can't deny the right to a hearing of some kind?"

"I don't think so."

There is little to add to what Mr. Justice Frankfurter wrote in concurrence in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 160-174, in condemning the Attorney-General's designation of an organization as subversive without notice or hearing. He stated in part (*id.* at 161-162, 165-166, 170, 171-172):

... [D]esignation has been made without notice, without disclosure of any reasons justifying it, without opportunity to meet the undisclosed evidence or suspicion on which designation may have been based, and without opportunity to establish affirmatively that the aims and acts of the organization are innocent. It is claimed that thus to

main or decapitate, on the mere say-so of the Attorney General, an organization to all outward-seeming engaged in lawful objectives is so devoid of fundamental fairness as to offend the Due Process Clause of the Fifth Amendment.

Fairness of procedure is "due process in the primary sense." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 672, 681. It is ingrained in our national traditions and is designed to maintain them. In a variety of situations the Court has enforced this requirement by checking attempts of executives, legislatures, and lower courts to disregard the deep-rooted demands of fair play enshrined in the Constitution. "[T]his court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, . . ." *Japanese Immigrant Case (Yamataya v. Fisher)*, 189 U.S. 86, 100, 101. "[B]y 'due process' is meant one which, following the forms of law, is appropriate to the case, and just to the parties to be affected. It must be pursued in the ordinary mode prescribed by the law; it must be adapted to the end to be attained; and wherever it is necessary for the protection of the parties, it must give them an opportunity to be heard respecting the justice of the judgment sought." *Hagar v. Reclamation Dist.*, 111 U.S. 701, 708. "Before property can be taken under the edict of an administrative officer the appellant is entitled to a fair hearing upon the fundamental facts." *Southern R. Co. v. Virginia*, 290 U.S. 190, 199. "Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement

of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." *Brinkerhoff-Faris Trust & Sav. Co. v. Hill, supra*, 281 U.S. at 682.

* * *

The construction placed by this Court upon legislation conferring administrative powers shows consistent respect for a requirement of fair procedure before men are denied or deprived of rights. From a great mass of cases, running the full gamut of control over property and liberty, there emerges the principle that statutes should be interpreted, if explicit language does not preclude, so as to observe due process in its basic meaning. [Cases cited.] Fair hearings have been held essential for rate determinations and, generally, to deprive persons of property. An opportunity to be heard is constitutionally necessary to deport persons even though they make no claim of citizenship, and is accorded to aliens seeking entry in the absence of specific directions to the contrary. Even in the distribution by the Government of benefits that may be withheld, the opportunity of a hearing is deemed important.

* * *

The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

* * *

Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely

depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

As Mr. Justice Douglas observed in concurrence in *Joint Anti-Fascist Refugee Committee*, the evil of acting without notice and hearing, mischievous enough when it is an organization which is jeopardized, is compounded when it is the fate of the individual which is at stake (*id.* at 178). As he also stated (*ibid.*):

Notice and opportunity to be heard are fundamental to due process of law. We would reverse these cases out of hand if they were suits of a civil nature to establish a claim against petitioners. Notice and opportunity to be heard are indispensable to a fair trial whether the case be criminal or civil. [Cases cited.] The gravity of the present charges is proof enough of the need for notice and hearing before the United States officially brands these organizations as "subversive." No more critical governmental ruling can be made against an organization these days. It condemns without trial. It destroys without opportunity to be heard. The condemnation may in each case be wholly justified. But government in this country cannot by edict condemn or place beyond the pale. The rudiments of justice, as we know it, call for notice and hearing—an opportunity to appear and to rebut the charge.

The Court of Appeals for the Ninth Circuit too wrote in a great tradition in *Parker v. Lester*, 227 F.

2d 708 (C.A. 9). Under an executive order⁴⁹ issued pursuant to the Magnuson Act,⁵⁰ seamen were required to have security clearance to serve on merchant vessels, which the Commandant of the Coast Guard granted if he was "satisfied that . . . the presence of the individual on board would not be inimical to the security of the United States." Seamen had been denied clearance after hearings which did not include presentation of evidence against them. The Court of Appeals asked: "Is this system of secret informers, whisperers and tale bearers of such vital importance that it must be preserved at the cost of denying to the citizen even a modicum of the protection associated with due process?" 227 F. 2d at 719. It answered: "the system of screening here under attack constitutes a violation of due process" (*id.* at 720), expressing its faith that "the time has not come when we have to abandon a system of liberty for one modeled on that of the Communists" (*id.* at 721). Yet what was condemned in *Parker v. Lester* is pale by comparison with what was done in this case.

But for the bewitchment of security and the spell of the military, there would hardly be room for doubt. The Arizona Supreme Court recently wrote with compelling clarity in a context not different in principle from this case but free of diverting influence. *In re Burke*, 87 Ariz. 336, 351 P. 2d 169. A member of the Minnesota bar sought admission to the Arizona bar. Based on the evidence presented by him, the applicant was of good moral character, but the Committee on Examinations and Admissions declined to recommend

⁴⁹ Exec. order No. 10173, 15 Fed. Reg. 7005, 7007.

⁵⁰ 64 Stat. 427, 50 USC §§ 191, 192, 194.

his admission, relying upon derogatory information contained in a confidential report, secret and undisclosed, received from "the National Conference of Bar Examiners, an efficient organization which conducts investigations of the character and background of applicants for bar admission in almost every state" (351 P. 2d at 172). The Arizona Supreme Court ordered the applicant's admission to the bar, holding that a secret report could not be a valid basis for rejection. It explained that (*ibid.*):

We shall not compel the committee to abuse its trust and reveal its sources. This would not only sanction a breach of trust but would dry up its sources and destroy its future effectiveness. However, we cannot allow information of this nature to be used by the committee for the purpose of denying a man due process in so vital a matter as the right to practice his chosen profession. To do so would be to open the door to the most noxious type of character assassination and guilt by innuendo. If respectable persons have derogatory information or bona fide charges to level against an applicant, they should not hesitate to come out into the open and speak the truth. If they insist on hiding behind a cloak of secrecy, then their evidence cannot be used to impeach the character of a man whose only apparent fault has been to acquire a few devious secret enemies.

We hold therefore that denial of admission to the practice of law cannot be based solely upon secret reports not revealed to the applicant.

The axe fell on Rachel Brawner without notice, without explanation of what the security requirements constitute, without a statement of reasons particularizing the respects in which she allegedly failed to meet them, without an opportunity to answer, without presenta-

tion of the evidence against her, and without presentation of evidence on her behalf. The only alternative to saying that Rachel Brawner was denied due process is to say that she is entitled to none.

B. FIRST AMENDMENT

Not only is the total subjection of the individual to the uncontrolled will of the officers offensive to due process (*Yick Wo v. Hopkins*, 118 U.S. 356, 366-367), it conflicts with the First Amendment as well. Under the regime of absolute governmental power manifest by this case the only safety of the citizen against official oppression—if he is safe even then—is to speak only banalities, to read or write only commonplaces, and to associate with none about whom an eyebrow could be raised. Anything less than unrelieved anonymity exposes the individual to the risk of governmental condemnation as a security risk without even the right to know the why or the where, much less to defend. In this environment every value that the First Amendment is designed to protect against governmental abridgment would perish.

The Navy Department itself cautions employees to conform and to abjure unconventional belief and expression. Its "Suggested Counsel to Employees," appended to its "Navy Civilian Personnel Instructions," states that:⁵¹

A number of our citizens unwittingly expose themselves to unfavorable or suspicious appraisal which they can and should avoid. This may take the form of an indiscreet remark; an unwise selection of friends or associates; membership in an organization whose true objectives are concealed

⁵¹ Quoted in Brown, *Loyalty and Security*, 191, n. 8 (1958).

behind a popular and innocuous title; attendance at and participation in the meetings and functions of such organizations even though not an official member; or numerous other clever means designed to attract support under false colors or serving to impress an individual with his own importance.

It is advisable to study and seek wise and mature counsel prior to association with persons or organizations of any political or civic nature, no matter what their apparent motives may be, in order to determine the true motives and purposes of the organization. . . .

The existence of [rights and liberties under the Constitution] should encourage and inspire each one of us to so conduct ourselves that there cannot be the least concern on the part of our associates as to our adherence to the principles of this government, or as to our reliability. . . . This counsel is prompted by the Commanding Officer's sincere interest in the continued well-being of all employees of the activity.

A Navy hearing board stated that an employee "must order his life with such positive knowledge as will absolutely negate the risk of guilt by association."⁵² These remarks simply make explicit what is terribly evident even when unspoken. And behind the drive to orthodoxy "is a severe sanction: conform or lose your job. Furthermore, the sanction usually has the weight of government behind it. We thus meet head on the deep-rooted repugnance of our people, expressed in the First Amendment, to official control of opinion."⁵³

⁵² *Ibid.*

⁵³ *Id.* at 193.

This case is at the extreme of official oppression. Stripped of any means to defend, the employee can only protect himself by living the life of a cipher. Unafraid expression of belief must be relinquished; apprehensive association is the order of the day. The values enshrined by the First Amendment are eroded. The encroachment may be indirect, but it is not for that reason constitutionally less objectionable.⁵⁴ So long as the First Amendment stands, respondents' action cannot.⁵⁵

IV. RESPONDENTS CANNOT ESCAPE ANSWERABILITY FOR THEIR UNAUTHORIZED AND UNCONSTITUTIONAL CONDUCT BY THEIR CLAIM THAT RACHEL BRAWNER WAS NOT SUFFICIENTLY INJURED BY IT, NOR BY THEIR CLAIM THAT THE GOVERNMENTAL OWNERSHIP OF THE LAND ON WHICH THEY ACTED ABSOLUTELY LICENSED WHAT THEY DID

We return to *Greene v. McElroy*, 360 U.S. 474. This case differs from *Greene* only in that the action taken here is more extreme. William Greene was given a limited hearing; Rachel Brawner had no hearing at all. William Greene had access to classified information; Rachel Brawner did not. Respondents in *Greene* acted in conformity with a departmental regulation which was defective for want of authority from the President or Congress; respondents in this case lacked even departmental authority. And the unconstitutional character of the action taken, if authorized, is more obvious in this case than in *Greene*.

⁵⁴ *N.A.A.C.P. v. Alabama*, 357 U.S. 449, 461; *Speiser v. Randall*, 357 U.S. 513, 518-519.

⁵⁵ In addition to the cases cited in the preceding note, see *Watkins v. United States*, 354 U.S. 178; *Sweezy v. New Hampshire*, 354 U.S. 234.

Nevertheless the court below holds that *Greene v. McElroy* does not control. It asserts (1) that Rachel Brawner was insufficiently injured to complain, and (2) that respondents' conduct was absolutely licensed by the governmental ownership of the land on which they acted. We turn to these propositions.

A. INJURY

The court below states that *Greene v. McElroy* is different from this case because, as William Greene is an aeronautical engineer and Rachel Brawner is a cook, denial of security clearance to Greene meant "total debarment from an occupation" (R. 157, 158, 163, 164), whereas Brawner could continue to work at "scores of places open to short-order cooks here and everywhere" (R. 159). The distinction is irrelevant in law and inaccurate in fact.

1. Mike Raich worked as a cook in a restaurant in Arizona. Of his employment as a cook, this Court stated: "It requires no argument to show that the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Truax v. Raich*, 239 U.S. 33, 41. This Court affirmed an injunction restraining Raich's employer from complying with, and state officials from enforcing, a state statute which unconstitutionally required the employer to discharge him. Rejecting the argument that Mike Raich had no legally protected interest in his job as a cook because it was "an employment at will," this Court explained that (239 U.S. at 38):

The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the

weight of authority, the unjustified interference of third persons is actionable although the employment is at will.

Rachel Brawner stands in an *a fortiori* position. For her employment was not at will. The collective bargaining agreement safeguarded her against discharge or suspension "without good and sufficient cause" (*supra*, p. 4).⁵⁶ She surely has a legally protected

⁵⁶ *Woodward Iron Co. v. Ware*, 261 F. 2d 138, 140 (C.A. 5). For a description of the scope of the substantive and procedural protection which an employee enjoys under such an agreement, see Phelps, *Discipline and Discharge in the Unionized Firm* (1959); Stessin, *Employee Discipline* (1960). Where "an employee is disciplined for having allegedly committed some act of moral turpitude, such as stealing, engaging in aberrant sexual practices, or participating in subversive activities . . . the arbitrator will generally insist in such cases that the employer prove his charges beyond a reasonable doubt." Aaron, *Some Procedural Problems In Arbitration*, 10 Vand. L. Rev. 733, 742 (1957). *E.g.*, *United States Steel Corp.*, 29 LA 272, 277; *Cannon Electric Co.*, 28 LA 879, 883; *Kroger Co.*, 25 LA 906, 908; *Marlin Rockwell Corp.*, 24 LA 728, 729-730; *General Refractories Co.*, 24 LA 471, 481-482; *Fruehauf Trailer Co.*, 21 LA 832, 834-836; *Amelia Earhart Luggage Co.*, 11 LA 301, 302. The reason for proof beyond a reasonable doubt is that to sustain a discharge for criminal or other opprobrious conduct stigmatizes the employee and impairs his employment opportunities elsewhere. For this reason too it has been stated that there is in this class of cases a "clear exception to the general rule of informality in the introduction of evidence and the examination of witnesses. . . . [T]he employee should be permitted to invoke some of the legal rules of evidence for his own protection. In most instances of this kind the principle problem concerns the rights of confrontation and cross-examination." Aaron, *op. cit.*, 10 Vand. L. Rev. at 745-746. In the case of discharges oriented in loyalty and security considerations, there is increasing insistence upon solid substantiation of the genuine need for dismissal. *E.g.*, *Westinghouse Electric Corp.*, 35 LA 315; *RCA Communications, Inc.*, 29 LA 567; *Republic Steel Corp.*, 28 LA 810; *Pratt & Whitney Co., Inc.*, 28 LA 669; *National Food Corp.*, 24 LA 567; *Worthington Corp.*, 24 LA 1; *J. H. Day Co., Inc.*, 22 LA 751, 755.

interest against the "unjustified interference" with the retention of her employment. The same law that protected Mike Raich's job as a cook protects Rachel Brawner's.

2. Even if it were true that the sole injury suffered by Rachel Brawner was the loss of her particular job in the Gun Factory cafeteria which she had held for six and one-half years, it would be injury enough. *Peters v. Hobby*, 349 U.S. 331, teaches as much. Dr. Peters was a professor of medicine at Yale University. He was employed as a Special Consultant in the United States Public Health Service. His services in that capacity comprised four to ten days each year, for which he was compensated at a specified *per diem* rate for days actually worked. 349 U.S. at 333-334. Yet that was held to be a sufficient interest to entitle Dr. Peters to protest his debarment from federal employment. And this was so despite the absence of the slightest suggestion that his work in his chosen field was impaired, for there is no intimation that Dr. Peters' full-time employment at Yale University as professor of medicine was jeopardized in the least. If a medical consultant's four to ten days employment in that capacity in an annual period is sufficient, surely a cook's full-time employment is entitled to the protection of the law.

The penultimate sentence of this Court's opinion in *Greene v. McElroy* identified the injury to William Greene as the loss of "his job" (360 U.S. at 508). This Court further stated in *Greene v. McElroy* that the "right to hold *specific private employment* and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment . . ."

(360 U.S. at 492, emphasis supplied). The advertence to "specific private employment" separately from pursuit of a "chosen profession" is meaningful only as it identifies the loss of a particular job as itself a sufficient injury. Finally, in *Taylor v. McElroy*, 360 U.S. 709, a companion case to *Greene v. McElroy* dismissed as moot, the employee denied clearance and consequently discharged was a lathe operator and tool and die maker. Mootness aside, it is inconceivable that the result in *Taylor v. McElroy* would have been different from *Greene v. McElroy* because there are "scores of places open to" a lathe operator and tool and die maker "here and everywhere." The difference between a menial job and a distinguished job, between work with the hand and work with the brain or both together, is a distinction to which the law is blind.

3. Rachel Brawner's loss of her job at the Gun Factory has caused her a permanent injury from which she can never recover regardless of her securing a comparable job elsewhere. She had six and one-half years' seniority when she was discharged.⁵⁷ Under a collective bargaining agreement, among other things, seniority protects the older employees from layoff until the employees junior to him have been furloughed. Without returning to the employment from which she was discharged, Rachel Brawner can never regain the six and one-half years' seniority she lost. However comparable any job may be with any other employer, Rachel Brawner must start at that new employment

⁵⁷ The opposition to certiorari erroneously states that Rachel Brawner "is among the lower quarter of the cafeteria's employees in seniority . . ." (p. 9, n. 6). On October 10, 1960, of the 35 employees then on the payroll, Rachel Brawner's seniority standing would be fourteenth from the top. This places her in the upper four-tenths, not the "lower quarter."

with zero seniority. And it hardly needs to be added that the "seniority right of the man who toils, indoors or out, in a shop or in an office, is a most valuable economic security, of which he may not be unlawfully deprived." *Elder v. New York Central R.R. Co.*, 152 F. 2d 361, 364 (C.A. 6).

4. But it is not even true that Rachel Brawner has lost only her particular job and its perquisites. Her employment opportunities generally have been drastically curtailed. Respondents themselves conceded in their petition for rehearing below that Rachel Brawner cannot be employed by "operators of restaurants and cafeterias . . . located on military installations in and around the Washington area" (Pet. p. 6). The injury is wider and deeper than that. As Oliver T. Palmer, business agent of the Union, testified at the arbitration hearing (R. 52):

An employee who may be discharged as a security risk has not a ghost of a chance of getting a job in a Government cafeteria, and it is very difficult to obtain employment for any employee who has that tag on them, in any cafeteria. That is a problem, and if they have that tag, it is almost impossible to find them another job.

Rachel Brawner's effective debarment from private employment in cafeterias and restaurants operated by private employers on governmental premises is a serious inroad into her employment opportunities. Of the 2,600 employees represented by the Union, 2,000 are employed in cafeterias and restaurants located within governmental buildings (R. 52). And, as the business agent testified, even private employment on nongovernmental premises becomes "very difficult to obtain . . ." (R. 52). Were the actual extent of the

injury material, a trial would establish that from her discharge on November 15, 1956 to October 17, 1960, a period of 204 weeks, Rachel Brawner had been gainfully employed for about 105 weeks, or about 51 percent of the time, in contrast with her full time employment for six and one-half years before her discharge.

5. The injury from deprivation of employment on security grounds is not confined to economic loss. The stigmatization of reputation is a gnawing wrong. As Judge Fahy stated, "The public draws no sharp distinction between security and loyalty."⁵⁸ *Cf. Vitarelli v. Seaton*, 359 U.S. 535. As the Supreme Court has said of exclusion from public employment on disloyalty grounds, "In the view of the community, the stain is a deep one; indeed, it has become a badge of infamy." *Wieman v. Updegraff*, 344 U.S. 183, 191. Engineer and cook alike suffer, in spirit and in reputation. They should have equal protection" (R. 178). For the court below the "rhetoric in these arguments is greater than their substance." (R. 161). For most of us reputation is a dear thing. "Good name in man and woman . . . is the immediate jewel of their souls."

6. The court below seems to stress that, between December 1 and 16, 1956, subsequent to her discharge by M & M on November 15, 1956, M & M offered Rachel Brawner employment at the Skylark Motel which it operated at Springfield, Virginia (R. 145, 159, 169), an offer which was rejected because the location was

⁵⁸ The difference between loyalty and security is not of kind but of degree. "Most security cases are cut from the same cloth as loyalty cases, and involve the same elements of beliefs and associations." Brown, *Loyalty and Security*, 10 (1958). Detecting a security risk "gets one into judging loyalties." *Ibid.*

unsatisfactory (R. 131). This offer has no relevance to respondents' wrongs in causing Brawner to lose her employment at the Gun Factory cafeteria, in impairing her opportunity to obtain employment elsewhere, and in besmirching her reputation. No one is free to invade a person's rights in one place because the victim can exercise them in another place. *Cf. Schneider v. Irvington*, 308 U.S. 147, 163. The offer of employment would be relevant, if relevant at all, only to the question of mitigating damages, and whether the offer does go towards mitigation depends on such factors as the distance of the proffered job from Brawner's home, the availability and cost of public transportation, the time consumed in going to and from work, the kind of job it is, the rate of pay, and the working conditions.

In stressing the offer of alternative employment, the court below assumes, without the least supporting evidence, that the employment offered was in fact satisfactory. Yet, were the inquiry material at all, a trial would conclusively establish that it was not. For it would show that, to the extent that public transportation is even available, it would take Rachel Brawner a minimum of three hours to travel to and from her home and the Skylark Motel, and the daily fare would be \$1.60.⁵⁹ At her hourly rate of pay of \$1.18 (*supra*,

⁵⁹ Information received from the D.C. Transit System, Inc., concerning public transportation between Rachel Brawner's home and the Skylark Motel, shows that:

"From 2342 Pomeroy Rd. S.E., [Rachel Brawner's home] walk to Stanton Road (one or two blocks). Take a W8 bus marked 'Navy Yard' to 10th & Pennsylvania. Then take an AB&W bus from 12th & Pennsylvania into Alexandria. Transfer at King and Washington Streets to another AB&W bus which goes into Springfield. The Skylark Motel is on Franconia Road and the bus passes the motel. The buses

p. 5), Rachel Brawner received \$9.44 for an 8-hour day. Thus, assuming the same rate of pay at the Skyark Motel, \$1.60 of Rachel Brawner's daily wage of \$9.44, or about 17 percent of her earnings, would go to pay for transportation, and it would take her at least three hours to travel to and from work. This is hardly a satisfactory alternative job.

But the heart of the matter is that to treat this case as if it turns on an offer of alternative employment, whether good or bad, is to trivialize the law. Rachel Brawner as a petitioner in this Court asserts her rights on her own behalf. The Union as a petitioner in this Court asserts the rights of all employees it represents who are similarly situated. The rights of Rachel Brawner and her fellow employees do not depend upon whether the employer runs other establishments at which employment may be available, whether he is willing to offer alternative employment, or whether alternative employment is available from other employers. What the Rachel Brawners can do for themselves or what others are willing to do for them to mitigate the injury does not detract from their right to be free of unjust action at respondents' hands or from respondents' duty to refrain from unjust action.⁶⁰

from Alexandria to Springfield and vice versa only leave at the rush hours—they do not leave at all hours of the day. The one-way fares are as follows:

D. C. Transit—20¢ (token), 25¢ (cash)
AB&W —60¢

“The time spent in making the trip (one-way) would take at least an hour-and-a-half, depending on the kind of connections made.”

⁶⁰ The court below would treat this case as if all that were involved were the transfer of an employee from one assignment to another within the same organization (R. 158-159). But in-

7. Respondents in their opposition to certiorari claim that as a result of the replacement of M & M by Inplant as the concessionaire operating the Gun Factory cafeterias, and notwithstanding Inplant's promise to reinstate Rachel Brawner "with retroactive seniority rights" if she prevails in her suit (*supra*, p. 18), Rachel Brawner "is in effect now in a position of a person seeking access to the base in order to assume new employment," and she should no longer be considered

voluntary ouster of an employee from the unit covered by the collective bargaining agreement can in no circumstances be considered a conventional transfer; nor, the agreement aside, can anything in this case be treated as if it constituted merely normal personnel movement within an organization. Finally, the notion of the court below that it would be "fantastic" to suggest that employees cannot be moved "from here to there" willy-nilly mirrors simply the inadequacy of its information (R. 159). Prohibition of involuntary transfer is not uncommon in collective bargaining agreements: "Certain restrictions on transfers are also included in a number of agreements. The most common declares that permanent transfers may be made only by mutual consent, that no employee is required to accept such transfer. These provisions apply particularly to interplant transfers involving a change in residence." *Basic Patterns in Union Contracts*, Bur. Nat. Aff., 75:10 (4th ed., Oct. 1957). For example, the nationwide agreement between the Western Union Telegraph Company and the Commercial Telegraphers' Union, AFL-CIO, which covers an operation in which personnel movement is relatively frequent, contains in its Section 7.11 the flat prohibition that "No employee shall be transferred without his consent." Section 23(c) of the Ford-UAW agreement provides that "Transfers of seniority employees from one plant to another may only be made with the signed consent of the employee and his Committeeman." 1 CCH Lab. Law Rep., Union Contracts, ¶ 59,923, p. 86,036. Section 8(b) of the Pittsburgh Plate Glass Co.—Glass Blowers agreement provides that "No employee shall be compelled to accept a proposed transfer." *Id.* ¶ 59,938, p. 36,811. For other contracts, see *Collective Bargaining, Negotiations and Contracts*, Contract Clause Finder, Bur. Natl. Aff., 68:422-68:423; *Collective Bargaining Provisions, Promotion, Transfer, and Assignment*, Bull. No. 908-7, U.S. Dept. Lab., Bur. Lab. Stat., 40-41 (1948).

to be striving "to protect on old job . . ." (p. 9). This is the sheerest casuistry. It is not the job that is new but the employing corporate entity. And even as to the latter, the President and Treasurer of Inplant had been supervisor of the Gun Factory cafeterias when operated by M & M, and the Vice-President and Secretary of Inplant had been secretary of M & M (*supra*, p. 18). That the change in the employing entity made no change in the essential attributes of the employment relationship was evidenced by Inplant's prompt recognition of the Union as the representative, its assumption of the obligations of the existing collective bargaining agreement, and its promise to reinstate Rachel Brawner (*supra*, p. 18). A change in the identity of the employer without alteration of the essential attributes of the employment relationship does not change the character of the job or the employee's interest in it.⁶¹ But even if it could be said that Brawner's promised employment by Inplant is acquisition of a new position, not reinstatement in an old position, it would make no difference. As with the merchant seamen in *Parker v. Lester*, 227 F. 2d 708, 713-714 (C.A. 9), "Although the employment of which plaintiffs were deprived was prospective only, yet their right to earn a livelihood, like that in *Traux* [v. *Raich*, 239 U.S. 33], was entitled to protection at the hands of a court of equity." Getting a job is as important as keeping a job.

In sum, *Greene v. McElroy* cannot be distinguished upon the ground that William Greene was hurt but Rachel Brawner was not. Both suffered enough, and

⁶¹Cf. *Miller Lumber Co.*, 90 NLRB 1361; *National Labor Relations Board v. Armato*, 199 F. 2d 800 (C.A. 7); *National Labor Relations Board v. Colton*, 105 F. 2d 179, 183 (C.A. 6).

it is an almost insulting irrelevancy to ask who suffered more.

B. LAND OWNERSHIP

The court below states that *Greene v. McElroy* is different because William Greene worked on private property while Rachel Brawner worked on federal property. Denial of access to her place of employment within the grounds was, so the court states, in the exercise of the commanding officer's "right to protect entrance to the Factory"; "we fail to perceive any limitation upon the discretion of the commanding officer in respect to civilian presence within his command", nor any public right which would "act as a restriction upon the otherwise unfettered discretion of naval officers in such a matter" (R. 155).

On this premise, had William Greene worked on federal property, his employment could have been destroyed and his reputation besmirched with no hearing at all, via the power to control access to governmental land. We were unaware that authorization for acts done by a governmental official is unnecessary if the acts are performed on land owned and occupied by the sovereign. Nor were we aware that the Constitution stops at the entrance to a Navy installation. Cf. *Reid v. Covert*, 354 U.S. 1; *Kinsella v. Singleton*, 361 U.S. 234; *Grisham v. Hagan*, 361 U.S. 278; *McElroy v. Guagliardo*, 361 U.S. 281. Denial of bare access to the premises unaffected by any other interest would be one thing, but debarment from the grounds on security considerations with the consequence of job loss, employment opportunity impairment, and reputation besmirchment is quite another. A man's home may be his castle, but that does not mean he may drive his wife

and children from it. Nor does federal ownership of the premises on which the Gun Factory is located mean that officials may destroy the employment and sully the name of persons working within the grounds.

As Judge Edgerton observed (R. 179), were the premise sound, no governmental employee could ever have successfully challenged his ouster from public employment on security grounds. For the short answer to his protest would have been that the sovereign cannot be required to permit him to work in a building it owns and from which his entry could be barred. But this Court has required the restoration of public employment to governmental employees, as to federal employees because the ouster exceeded or did not conform with the authority conferred (*Cole v. Young*, 351 U.S. 536; *Peters v. Hobby*, 349 U.S. 331; *Service v. Dulles*, 354 U.S. 363; *Vitarelli v. Seaton*, 359 U.S. 535), and as to state employees because the authority conferred was constitutionally invalid (*Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Board of Higher Ed.*, 350 U.S. 551). And the "liberty [of persons in private employment] to follow their chosen profession is no doubt a right more clearly entitled to constitutional protection than the right of a government employee to obtain or retain his job." *Parker v. Lester*, 227 F. 2d 708, 717 (C.A. 9).

Respondents would distinguish upon the ground that these cases stand only for judicial vindication of rights in public employees created by statute, executive order, or regulation. But this distinction does not explain the protection extended to public employees of the states. For when this Court safeguards the public employment of state employees it does not vindicate state-created rights but protects only the federal rights guaranteed

by the United States Constitution. And the state's ownership or control of the property on which its employees work does not relieve it of its constitutional obligation to refrain from unconstitutional treatment of its public employees. Nor does respondents' distinction explain the basis for decision concerning the public employment of federal civil servants. True, this Court has thus far been able to base decision upon the nonconstitutional ground of departure from a controlling statute, executive order, or regulation. But this ground for decision has been importantly influenced by the need to eschew constitutional objections which would otherwise be presented. *Peters v. Hobby*, 349 U.S. 331, 338; Mr. Justice Harlan concurring in *Greene v. McElroy*, 360 U.S. 474, 509. Federal ownership or control of the place of employment does not dispense with the constitutional objections. Stating that "None would deny such limitations on congressional power," this Court agreed, notwithstanding governmental dominion over the property on which they work, that "federal employees are protected by the Bill of Rights and that Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " *United Public Workers v. Mitchell*, 330 U.S. 75, 100.

Nor do respondents advance their position by asserting the need to protect military secrets within naval installations. The same need "to protect the integrity of secret information" was pressed in *Greene v. McElroy*, 360 U.S. 474, 493, but that need was held not to validate otherwise unauthorized means directed to that end. As a factor in decision the element of

military secrecy has no greater urgency on military bases than off them. There are as many secrets in private factories and laboratories as there are in governmental factories and laboratories. "The security dangers are about the same whether the Navy builds an atomic-powered submarine in the Brooklyn Navy Yard or has it built by the General Dynamics Corp."⁶² Secrecy as such cannot differentiate governmental premises from private premises. And the appeal to the need for secrecy is terrifyingly ironic when it is recalled that in this case summary governmental power is brought to bear, in the name of "the realisms of the world situation" (R. 154), upon a short order cook who has no access to classified information.

There is in truth no issue of secrecy in this case at all. As Mr. Justice Harlan observed in concurrence in *Greene v. McElroy*, 360 U.S. 474, 510, "The basic constitutional issue is not whether petitioner is entitled to access to classified material, but rather whether the particular procedures here employed to deny clearance on security grounds were constitutionally permissible." Nothing prevents summary denial of access to a place of employment within a naval facility on security grounds *pending* a hearing into the validity of the charges levelled against the employee, with compensation to the employee for any loss of earnings sustained by him if the charges against him are not substantiated upon a hearing. This eliminates any risk to any governmental interest from acts detrimental to security, while at the same time preserving the right to a hearing. It is unnecessary to the security of any valid governmental interest to jettison a hearing. And it is indispensable to a free society to preserve it zealously.

⁶² Brown, *Loyalty and Security*, 61 (1958).

Respondents are therefore reduced to the claim that the hearing itself is objectionable. And this was their argument on their petition for rehearing below, their position being that it would be inconvenient and expensive to hold hearings (pp. 11-12). We had not understood that due process was to be conferred, and First Amendment rights protected, only if it was cheap and easy. And if it be true that to conduct hearings would entail "a tremendous expenditure of time and money" (pet. for rehearing, p. 12), that expenditure would indeed be "applied to the defense of the United States" (*ibid.*) within the genuine scope of that term. For it takes more than guns to defend the United States. It takes a civilized procedure as well.

Since secrecy does not distinguish *Greene v. McElroy*, and since the right to a civilized procedure is in any event not incompatible with maintenance of security, respondents in the end are stripped to the single plea of bare dominion over property. They assert an "absolute control over property" (opp. to cert., p. 15).⁶³ insisting that access to it is a privilege which they are free to grant or withhold at will (*id.* at 15-16). A similar claim of "unrestricted power" exalted into "an absolute" was rejected by this Court just the other day (*Gomillion v. Lightfoot*, 29 U.S. Law Week 4024, 4025), this Court reminding that state power "acknowledged

⁶³ The cases cited in support have about as much relevance to the issues in this case as the grazing of cattle has to the employment of human beings. *Utah Power & Light Co. v. United States*, 243 U.S. 389, concerns occupancy of public lands without compliance with regulations not shown to be invalid; *United States v. Midwest Oil Co.*, 236 U.S. 459, concerns withdrawal of public lands containing petroleum deposits from private acquisition; *Light v. United States*, 220 U.S. 523, concerns regulation of grazing on forest preserves; and *Camfield v. United States*, 167 U.S. 518, concerns inclosure of public lands.

to be absolute in an isolated context" cannot be exploited "to justify the imposition of an 'unconstitutional condition'" (*id.* at 4026).⁶⁴ Even as to benefits conferred by government, the influence of government in modern society is too exigent to treat it as if in the exercise of its functions it were a mere distributor of foregoable largesse which the putative donee is realistically free to spurn if the terms of the gift are objectionable. And so "conditions imposed upon the granting of privileges or gratuities must be 'reasonable.'" *Speiser v. Randall*, 357 U.S. 513, 518. Hence, even on respondents' verbalization of the issue in terms of privilege, what respondents claim they are privileged to do is plainly unreasonable. For they assert the absolute power summarily to brand an employee as a security risk and thereby to cause him to lose his job, impair his opportunity for employment elsewhere, and sully his name. Control of property however absolute privileges no such conduct. At this late date an appeal to privilege to exorcise the rights of others is jejune.⁶⁵

This Court has already spoken. Where a governmental manager, installed by a federal agency to supervise a village owned by the federal government, denied a person the right to religious proselytism in that village, this Court held it no defense that "the federal Government owns and operates the village." * * * Certainly neither Congress nor Federal agencies acting pursuant to Congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment." *Tucker v. Texas*, 326 U.S. 517.

⁶⁴ See also, *Frost v. Railroad Commission*, 271 U.S. 583; *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349-351.

⁶⁵ See Davis, *The Requirement of A Trial-Type Hearing*, 70 Harv. L. Rev. 193, 225-243 (1956).

520. As this Court said of a company-town wholly owned by a corporation, so with the premises of the Gun Factory wholly owned by the Government, "We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it." *Marsh v. Alabama*, 326 U.S. 501, 505-506. And whether it is "a private corporation" or "the Federal Government" that "owns and operates" the property "does not affect the result." *Tucker v. Texas*, 326 U.S. 517, 520. Within our scheme of limited powers, federal officers are not lords of the manor empowered to do as they will.

CONCLUSION

For the reasons stated the judgment below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

**CAFETERIA AND RESTAURANT WORKERS
UNION, LOCAL 473, AFL-CIO,
AND RACHEL M. BRAUNER, Petitioners,**

v.

NEIL H. McELBOY, THOMAS S. GATES, ET AL.

**ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE DISTRICT OF
COLUMBIA CIRCUIT**

**BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE**

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR
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INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of labor unions whose total membership is approximately thirteen million. As the principal spokesman for organized working people in the United States, the Federation has set forth in the following terms its official position on the necessity for protecting

traditional American freedoms against both attack from without and erosion from within:

"This Federation is proud that the labor unions of America have traditionally stood in the forefront of the fight for the preservation and expansion of individual civil liberties. We are proud, too, that the unions comprising this Federation were among the first to point out and take steps against the dangers to our freedom and security posed by international Communism. The fight to protect this nation against Communist aggression must be carried on with vigor and determination. But the Communist threat must and can be met without endangering our traditional liberties or impinging upon the freedoms guaranteed by the Bill of Rights." *AFL-CIO Resolution on Civil Liberties and Internal Security, December 7, 1955, AFL-CIO Constitutional Convention Proceedings, p. 113 (1955).*

A number of the unions affiliated with the AFL-CIO are directly interested in the resolution of the issue being presented to the Court in the present case. Members of such unions are employed on numerous projects on government installations, and so their employment rights are subject to being adversely affected as were the employment rights of the individual petitioner here. In addition, nearly all of the unions affiliated with the Federation have members who may be indirectly affected by the decision in this case. These members have been subject to one or other of the various security programs operated by the federal government for government employees and for employees of government contractors. Obviously, the Court's decision in the present litigation could have implications regarding the scope and procedures of all government security programs in the future.

Union officials and union lawyers have expended much time and effort to avert or right injustices under the vari-

ous loyalty-security programs.¹ We have become convinced that certain features of these loyalty-security programs, notably the use of statements by informants whose identity is kept secret from the accused and often from the adjudicating boards, constitute a denial of some of the basic rights guaranteed by the United States Constitution. We are just as convinced that these constitutional infirmities cannot be cured by labeling as a mere denial of access to government property what is essentially a security proceeding affecting employment rights.

As a labor organization the AFL-CIO is directly interested in seeing that union members are not deprived of the means of a livelihood through unconstitutional procedures. In a larger sense, we are interested in seeing that no American is deprived of the full exercise of his constitutional liberties, and that the nation is not deprived of the traditions of fair play that are essential to the democratic process.

ARGUMENT

Petitioners in their brief before this Court, and the four dissenting judges in the decision below,² have thoroughly explored the legal arguments supporting the conclusion that causing the discharge on "security" grounds of the individual petitioner in this case, without any kind of hearing whatsoever, was unauthorized and invalid. We fully subscribe to these views, and there is no need for the AFL-CIO as *amicus curiae* to elaborate them.

Our purpose is relatively limited and can be shortly stated. We wish to emphasize our conviction that the central issue raised here concerns the authorization and validity of a security proceeding affecting employment

¹ See Fleischman, Kornbluh, and Segal, *Security, Civil Liberties and Unions*, pp. 9-11, 16-20, 28-38 (AFL-CIO, Washington, 1957).

² Fahy, Edgerton, Bazelon, and Washington, C.JJ.

rights, and not the authorization and validity of official control over admission to government property. In support of this position we will adduce certain data indicating that a substantial group of working people could have their employment rights adversely affected by the arbitrary denial of access to government installations. In addition, we wish to place before the Court in summary fashion some estimate of the number of employees subject to security programs of various kinds throughout the country. For if the Court must reach a constitutional question in this case, we think it should be informed of the wide implications its decision might have regarding the rights of a vast number of American workers.

I. Causing A Discharge From Private Employment On Security Grounds Without A Hearing Is Unauthorized And Invalid, And Cannot Be Justified As An Exercise Of Official Control Over Government Property.

A. CLARIFICATION OF THE ISSUE

Speaking for the Court in *Rogers v. Helvering*, 320 U.S. 410, 413, Mr. Justice Frankfurter remarked, "In law also the right answer usually depends on putting the right question." No case could better illustrate the soundness of that observation than the present one: To Chief Judge Prettyman, writing for the five-member majority of the court below, the problem to be solved here is a "narrow one." Said he:

"It concerns the nature and extent of the power of a naval officer in command of a naval installation to control the ingress and egress of civilians to and from the premises. * * * It is not a discharge case." (R. 147-148.)

In essence this was the same way the government tried to present the issue to this Court in *Greene v. McElroy*, 360 U.S. 474. There the government revoked the security clearance of Greene, an aeronautical engineer employed by

a private manufacturer producing goods for the armed services. As a result Greene lost his job. In attempting to frame the issue in terms of a private person's interest in, and the government's power to control access to, secret military information, the government contended that when it "determines that it is no longer to its interest that a private person have access to such information, it is exercising its proprietary power over property committed to its custody * * *." (Brief for Respondents, No. 180, October Term, 1958, p. 31; see also *id.*, pp. 2, 17, 19, 29, 30, 59.) As paraphrased by this Court, the government was arguing in *Greene* that "the admitted interferences [with private employment rights] which have occurred are indirect by-products of necessary governmental action to protect the integrity of secret information * * *." 360 U.S. at 492.

Having discussed the government's view of the issue in *Greene*, the Court asserted flatly:

"The issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program *under which affected persons may lose their jobs* and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination." 360 U.S. at 493. (Emphasis supplied.)

In short, this Court refused to accept the sterile syllogism which the government wished to fashion from the admitted premise that it, and not a private person, had proprietary rights in secret military information. The Court instead insisted on looking at the living reality. And that revealed not merely the exercise of proprietary control over government property *in vacuo*, but the exercise of such control in a context where "affected persons may lose their jobs."

The same is true here. The issue is not, as the majority of the court below would have it, the authority of a naval officer to control access to a naval installation. The issue is the authority for the "deprivation of employment on security grounds" through an arbitrary exercise of such control. See Fahy, C.J., dissenting below (R. 178).

B. EMPLOYMENT ON GOVERNMENT PROPERTY

Rachel M. Brawner, the individual petitioner here, does not occupy a unique status. A great many American workers are employed by nongovernmental employers on property under the control of the government. As petitioners point out, the government's power to control access to its property should no more foreclose these workers from challenging the loss of their employment on security grounds than it foreclosed the government's own employees from successfully making similar challenges in the past. See *Peters v. Hobby*, 349 U.S. 331; *Cole v. Young*, 351 U.S. 536. Otherwise it would have been just as logical to conclude that the government could deprive its employees of their jobs for security reasons without procedural safeguards "by simply excluding them from the places where they work." See Edgerton, C.J., writing for the two-member majority of the division in the original decision by the court below (R. 135).

As of June 30, 1959 there were 2,382,807 paid civilian employees of the federal government, excluding employees of the Central Intelligence Agency.³ Neither the Department of Labor's Bureau of Labor Statistics nor the Department of Defense has been able to supply us with a corresponding figure for the number of persons employed by nongovernmental employers on government property. In

³ *World Almanac and Book of Facts*, p. 766 (1960). Data supplied by United States Civil Service Commission.

the absence of such a total, we can only place before the Court figures on employees in representative classifications or in representative locations. But even these scattered estimates, bulk large enough to demonstrate that a Brawner-type situation presents a genuine employment issue of substantial proportions and not a narrow property question of isolated application.

According to a spokesman for the Department of Defense, approximately 82,500 persons are employed by post exchanges and similar facilities throughout the world, distributed as follows:

Employees of Post Exchanges and Similar Facilities^{*}

Army and Air Force Facilities	
Within United States	23,400
Outside United States	44,100
	<hr/>
	67,500
Navy Facilities	
Within United States	9,000
Outside United States	6,000
	<hr/>
	15,000
Total All Employees	82,500

A representative of Government Services, Inc., a private concessionaire which has contracts with numerous government agencies, estimates that it has about 1,500 employees working in cafeterias alone on government property in the Washington, D. C. area.

^{*} Although the employees of post exchanges and similar facilities invariably work on government property, they are not employed by the government as such. Technically they are employees of "nonappropriated funds," operated with funds derived from the sales of goods and services by such facilities and not with funds appropriated by Congress. Respondents are in accord in likening the status of these employees to Brawner's. Respondents' Petition for Rehearing en Banc, No. 14,689 (D. C. Cir.), p. 11.

The employment picture at the single missile base of Cape Canaveral, Florida, could easily be that of an American city the size of Boise, Idaho or Orange, New Jersey or Independence, Missouri. Air Force officials have supplied the following estimates of the number of contractors, unions, and employees on the base:

Labor Force at Cape Canaveral, Florida

Private Contractors	130
Labor Organizations Represented	30
Employees Subject to Union Contracts ...	6,500-7,000
Total Working Force	20,000

Atomic Energy Commission installations are built, maintained, serviced, and even operated largely by private contractors. The number of contractors' employees engaged at work on these projects varies from time to time, but as of September 1960 figures in the possession of the Commission regarding employment units of significant size were as follows:

Employees of AEC Contractors

Employees of Operating Contractors	91,400
Employees of Construction Contractors	13,000
Employees of Cafeteria and other Service Contractors	3,800
	<hr/> 108,200

Virtually all these employees work on premises under the control of the AEC. Most if not all the employees of operating contractors are screened under the Commission's formal security program. Employees of construction and service contractors may or may not be cleared, depending on the nature and location of their work. But under the rationale propounded by the respondents, substantially all of these workers, merely because of their employment on

property under government control, could lose their jobs and be branded as security risks without any procedural safeguards whatsoever.

Respondents themselves presented to the court below estimates of the number of persons at military installations in situations akin to petitioner Brawner's. Included were the following figures on civilians of various classifications at six naval installations within the Potomac River Command:

Civilians at Six Potomac Naval Installations

Concessions	514
Tradesmen	1,807
Contract Employees	5,939
	<hr/> 8,350

At the same time respondents informed the court that a recent survey disclosed approximately 4,600 persons such as Brawner on a single Air Force base, with there being more than 200 such bases in the country.⁵

Respondents noted that the exact number of persons encompassed by the court's decision below was not known. But they estimated that "in all of the armed services there are several hundred thousand persons in positions similar to appellant Brawner's."⁶

There is no need to belabor the point. Clearly, a substantial body of American working people—perhaps "several hundred thousand"—have been placed in a situation where their jobs may be lost and their reputations blackened if they are arbitrarily denied access to government installations on "security" grounds. Nice abstractions re-

⁵ *Id.*, p. 14.

⁶ *Id.*, p. 11.

⁷ *Id.*, p. 12.

garding proprietary interests cannot gloss over that blunt reality.

C. INVALIDITY OF ACTION CAUSING LOSS OF EMPLOYMENT

The foregoing discussion indicates the nature and the magnitude of the question presented in this case. Petitioners' brief makes it unnecessary for us to do more than add a few remarks on what we consider to be the proper resolution of that question.

The AFL-CIO is in accord with petitioners that the naval officers acted here without the authority of Congressional statute or Presidential executive order in excluding petitioner Brawner from a naval installation because of undisclosed "security requirements" and thus causing the loss of her job with a private employer, without affording her a hearing, detailed statement of reasons, or procedural safeguards of any kind. This action of the naval officers, lacking Congressional or Presidential authorization, was thus invalid. *Greene v. McElroy*, 360 U.S. 474, is dispositive of this case. See also *Peters v. Hobby*, 349 U.S. 331; *Cole v. Young*, 351 U.S. 536; *Vitarelli v. Seaton*, 359 U.S. 535.

Interference with Brawner's private employment cannot be justified, and *Greene* cannot be distinguished, on the ground that the petitioner here is merely being denied access to government premises. Presumably *Greene* worked on private property, while Brawner worked on government property. But the government's purported aim in *Greene* was to deny access to secret military information in its custody. So there too government property was directly involved. And secret aeronautical information is, we trust, at least as valuable and substantial a piece of government property as the sod and cement of the Naval Gun Factory. Even if Brawner had access to restricted portions of the

Gun Factory, she had no more access to government secrets than had Greene.

II. If A Constitutional Question Must Be Reached Here, The Scope Of Government Security Programs Becomes A Significant Factor In Determining The Constitutionality Of The Programs' Procedural Safeguards.

In view of *Greene*, we feel there is no need for the Court to reach a constitutional question in this case. But if a constitutional question must be reached, then the AFL-CIO joins with petitioners in asserting that legislative or executive action purporting to authorize the arbitrary conduct of the naval officers here would be incompatible with due process of law under the Federal Constitution. We will not duplicate petitioners' arguments regarding the application of constitutional doctrines to the particular facts of this case. On the constitutional issue we wish merely to provide the Court with a brief sketch of the scope of various government security programs throughout the country.

A. RELEVANCE AND MATERIALITY OF DATA ON SCOPE OF GOVERNMENT SECURITY PROGRAMS

The essence of due process is that governmental action shall not be arbitrary. A reasoned, discriminating exercise of power has been the standard consistently imposed by this Court. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123; *Wieman v. Updegraff*, 344 U.S. 183; *Slochower v. Board of Higher Education*, 350 U.S. 551; *Speiser v. Randall*, 357 U.S. 513. In *Wieman v. Updegraff*, *supra*, this Court unanimously struck down a state statute requiring school teachers to take an oath denying affiliation with certain designated subversive organizations. The Court reasoned:

"Indiscriminate classification of innocent with knowing activity must fall as an assertion of arbitrary power. The oath offends due process. * * *

"We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U.S. at 191-192.

To avoid arbitrary action in the administration of the security programs, it is necessary "to balance the public's interest in security and the Government's right to assure it, on the one hand, as against the liberties of the individual, on the other." *Parker v. Lester*, 227 F.2d 708, 716 (9th Cir. 1955); cf. *Slochower v. Board of Higher Education*, 350 U.S. 551, 555.

We believe that if the Court is to strike a proper balance between the supposedly conflicting interests of national security and individual liberty, there should be placed before it data on the scope, methods, and impact of security programs throughout the country. We consider that this information becomes directly pertinent should the Court have to face a constitutional issue in this case. The possibility of injury to the public must be weighed against the possibility of injury to the individual. If the worst effect of the security programs were the discharge of a Los Alamos physicist or a State Department policy maker on the basis of the confidential reports of a professional FBI undercover agent, the national interest in concealing counter-espionage operations might have to prevail over the individual's interest in confronting the informant. However, when these federal and state programs reach nearly one-fifth of the nation's work force, thus subjecting the labor union shop steward in a defense plant, the high school algebra teacher, and the short order cook at the Naval Gun Factory to the threat of discharge and loss of reputation on the basis of tales told by the neighborhood gossip or a disgruntled former employer, then it is our opin-

ion that the balance swings to the side of the individual's interest in a full opportunity to face and rebut his accuser.

In short, our thesis is that the very scope of these security programs requires, at the least, a rational classification of the types of information that may be used against persons in various types of positions before attaching to them the infamous badge of "loyalty-security risk." To act otherwise, we submit, is to act with the arbitrariness that is offensive to due process.

In presenting the following summary of various security programs, we have drawn on several authoritative studies which have appeared in recent years, principally those by Eleanor Bontecou, the Bar Association of New York City, the Commission on Government Security, Professor Ralph S. Brown, Adam Yarmolinsky, and the Department of Defense.*

We will consider in order the security programs conducted by the federal government and those conducted by state and local governments.

B. DENIAL OF RIGHT OF CONFRONTATION AS A COMMON FEATURE OF FEDERAL SECURITY PROGRAMS

The federal government currently operates at least half a dozen different security programs. They apply to groups

* For the genesis and early development of loyalty-security programs, see Bontecou, *The Federal Loyalty-Security Program* (Cornell, 1953). Reviews and critiques by two separate groups of leading lawyers, educators, and public officials are contained in the Association of the Bar of the City of New York, *Report of the Special Committee on The Federal Loyalty-Security Program*, (1956) and *Report of the Commission on Government Security* (1957). A searching appraisal by an individual expert will be found in Brown, *Loyalty and Security* (Yale, 1958). Illuminating examples of the workings of the programs are provided by Yarmolinsky, ed., *Case Studies in Personnel Security* (1955). An official apologia is Department of Defense, *Industrial Personnel Security Review Program, First Annual Report* (1956).

in both federal and private employment. A common denominator of all these programs is the use of investigative agency files containing statements by secret informers. The person charged does not see these files. He may not know the identity of the informers. Even the members of the various adjudicating boards may not know the identity of the informers. This Court has already had occasion to see that even "professional informers" in security cases may be guilty of lying and perjury. *Communist Party v. Subversive Activities Control Board*, 351 U.S. 115; *Mesarosh v. United States*, 352 U.S. 1.

The secrecy with which the government shrouds casual informants, as distinguished from professional undercover agents, is apparently based on the belief of such agencies as the Federal Bureau of Investigation that otherwise their sources of information would dry up.⁹ This belief has been questioned in both judicial and academic quarters, on the ground that it is unproven in fact and that it is an unwarranted reflection on the willingness of loyal Americans to supply their government with information needed to combat subversion. *Parker v. Lester*, 227 F.2d 708, 718, n. 17 (9th Cir. 1955); Brown, *Loyalty and Security*, p. 396 (Yale, 1958). The Commission on Government Security has also disapproved the admissibility of information supplied by unidentified casual informants.¹⁰

In any event, the practice of utilizing the statements of secret informers goes back to the original Executive Order 9835, March 21, 1947, 12 Fed. Reg. 1935, which established the Truman "loyalty program." Part IV, section 2 of that Order provided that "the investigative agency may refuse

⁹ See statement made by FBI Director J. Edgar Hoover before Loyalty Review Board in 1947, quoted in *Report of Commission on Government Security*, pp. 657-658 (1957).

¹⁰ *Id.*, pp. xviii, 670.

to disclose the names of confidential informants." Other security programs have continued the practices of the original Truman program. Thus, section 9(k) of the Sample Security Regulations attached to Executive Order 10450, April 27, 1953, 18 Fed. Reg. 2489, which set up the Eisenhower security program for government personnel, declares:

"The board shall reach its conclusions and base its determination on the transcript of the hearing, together with such confidential information as it may have in its possession."

In *Greene v. McElroy*, 360 U.S. 474, this Court found no Congressional or Presidential authorization for the Department of Defense to establish a security program under which a government contractor's employees could lose their jobs without being afforded the traditional safeguards of confrontation and cross-examination. Since then the President has issued Executive Order 10865, February 20, 1960, 25 Fed. Reg. 1583. This relates in terms to the safeguarding of classified information within industry. In effect it sets up an industrial personnel security program. The executive order has been implemented for the armed services by Department of Defense Industrial Personnel Access Authorization Review Regulation, July 28, 1960.

Section 3(6) of Executive Order 10865 and paragraph IV.E.2.b. and c. of the Department of Defense Regulation give a very limited right of cross-examination to persons subject to security screening. Cross-examination is to be conducted either "orally" or by "written interrogatories," and the Director of the Office of Industrial Personnel Access Authorization Review is to rule "whether, in the light of all the circumstances, testimony shall be taken personally, by deposition, or through cross-interrogatories." Apparently this makes the precious right of direct con-

frontation of an accuser and the time-tested procedure of face-to-face cross-examination matters of administrative discretion. Cross-interrogatories do not begin to make an adequate substitute.

There is a yet more serious defect. As the cited portions of the Executive Order and Department of Defense Regulation make clear, even the limited right of cross-examination is not to apply to information relating to "the characterization in the statement of reasons of any organization or individual other than the applicant." A substantial proportion, and very likely the majority, of the items enumerated in "statements of reasons" in security cases relate to the characterization of some organization, or of some individual other than the applicant. See, e.g., the statement of reasons in *Greene*, 360 U.S. at 484, n. 14. To deny cross-examination with respect to the characterization of organizations, or of individuals other than the subject, is to deny essential safeguards at the very point where they are probably most needed.

Finally, section 4 of Executive Order 10865 enables the head of a department, so long as he makes a "personal review" of a case, to dispense altogether with cross-examination privileges where he determines that a witness "cannot appear to testify" due to such cause as he deems "good and sufficient."

Significantly, none of these authorizations for denying confrontation and cross-examination makes a binding, meaningful distinction between the casual informant and the undercover agent. Nor is such a distinction made between the person charged who is in a highly sensitive position, and the person charged who is in a position having no substantial relationship to the national security.

Yet, whatever their constitutional deficiencies, the pro-

cedures under the various formal security programs are models of reasonableness compared with the arbitrary action to which petitioner Brawner has been subjected in this case. Mrs. Brawner was told to turn in the identification badge required for entrance to and exit from the Gun Factory grounds. The explanation was "security reasons." (R. 41-42.) There was no detailed statement of reasons. There was no confrontation or cross-examination of accusers. There was not even a chance to be heard. And the nebulous standard for causing the discharge, viz., "security reasons," remains wholly unelucidated. For all the individual or union petitioner knows, "security reasons" to some naval officers might encompass the exclusion of a particularly energetic union organizer.

C. FEDERAL CIVILIAN EMPLOYEES

As of June 30, 1959 the federal government had 2,382,807 paid civilian employees, excluding employees of the Central Intelligence Agency.¹¹ In one way or another, they are all subject to discharge on security grounds.¹²

By far the largest number of federal employees subject to loyalty-security procedures have been those in the Executive Branch covered by the original Truman loyalty program, established pursuant to Executive Order 9835, March 21, 1947, or by its successor, the Eisenhower security program, established pursuant to Executive Order 10450, April 27, 1953.

Executive Order 10450 attempted to establish a comprehensive security program for all departments and agencies of the federal government, and in effect for all employees

¹¹ *World Almanac and Book of Facts*, p. 766 (1960). Data supplied by United States Civil Service Commission.

¹² However, the relatively few employees of the Congress and of the Judicial Branch have been little affected. *Report of Commission on Government Security*, pp. 101-107. See also *Brown, Loyalty and Security*, p. 23, n. 4 (1958).

therein. Section 8(a) provided the standard that the employment of any person must be "clearly consistent with the interests of the national security." Procedures under the Order were to be in accordance with those provided by P.L. 733, 64 Stat. 476, 5 U.S.C. §22-1, the principal statutory basis for the Order. P.L. 733 allows the summary suspension of employees by agency heads "when deemed necessary in the interest of national security" but grants the right of an agency hearing before final termination of employment to citizens holding permanent or indefinite appointments.

In *Cole v. Young*, 351 U.S. 536, this Court held that P.L. 733 was intended to apply only to positions invested with the "national security," and that the Executive Order was unauthorized insofar as it applied the summary procedures of P.L. 733 to "nonsensitive" positions.

The Personnel Security Program established by Executive Order 10450 remains in effect, of course, for civilian employees of the Executive Branch who are in "sensitive" positions. They constitute probably one-fourth to one-third of the federal civilian work force.¹³ All federal employees continue subject to the Hatch Act,¹⁴ which bars federal employment to persons advocating the overthrow of our constitutional form of government. Furthermore, about 85 per cent of the federal civilian employees are in the competitive civil service.¹⁵ These employees are cov-

¹³ Figures of 500,000-600,000 have been supplied by the Chairman of the Civil Service Commission. N. Y. City Bar Assn., *Report on the Federal Loyalty-Security Program*, p. 146 (1956). See also Brown, pp. 239-240.

¹⁴ Originally, the Act of August 2, 1939, §9A, 53 Stat. 1148, 5 U.S.C. §118j. Codified by the expanded Act of August 9, 1955, 69 Stat. 624, 5 U.S.C. §§118p-r, which also codified appropriation riders barring subversives.

¹⁵ N. Y. City Bar Assn., *Report*, p. 55; Brown, *Loyalty and Security*, p. 401.

ered by a Civil Service Commission regulation specifically denying appointment where there is "reasonable doubt as to the loyalty of the person involved."¹⁶

In *Vitarelli v. Seaton*, 359 U.S. 535, this Court held that a government employee in a nonsensitive position had to be afforded whatever procedural safeguards were provided in a departmental regulation covering discharges on security grounds, where his discharge was based on such grounds. However, it left undecided the constitutional question of what safeguards had to be provided.

By the time of *Vitarelli*, the federal government had probably completed most if not all the security screening of its civilian employees. Security inquiries thereafter had to be directed chiefly just to applicants for employment. There are about two million such persons listed by the Civil Service Commission as not eligible for government service.¹⁷ Generally, federal job applicants are granted no procedural rights at all, and may not even know why they have been rejected.¹⁸

D. ATOMIC ENERGY COMMISSION

Under express statutory authorization contained in the Atomic Energy Act,¹⁹ the Atomic Energy Commission conducts its own security program for Commission employees

¹⁶ 5 C.F.R. §2.106 (a) (7) (Supp. 1958); see also 5 C.F.R. §9.101 (a) (Supp. 1958), making the grounds for disqualification of an applicant (such as disloyalty) sufficient cause for removal of an employee. Some procedural safeguards are provided by the Lloyd-LaFollette Act, 37 Stat. 555 as amended, 5 U.S.C. §652 (charges, opportunity to reply, and written decision for employees in competitive service), and by the Veterans' Preference Act, 58 Stat. 390, as amended, 5 U.S.C. §863 (appeal and appearance before CSC for veterans having completed probationary period).

¹⁷ N. Y. City Bar Assn., *Report*, p. 115.

¹⁸ *Id.*, pp. 109-110. This has generated remedial recommendations. *Id.*, pp. 16-17; *Report of Commission on Government Security*, pp. 51-52.

¹⁹ 68 Stat. 942, 42 U.S.C. §2165.

and for those employees of the Commission's private contractors whose work gives them access to classified information.

Insofar as the Commission's program applies to its own employees, it embraces about 7,000 persons already counted in the previous section as federal civilian employees. However, the main impact of the Atomic Energy program is on the employees of private firms constructing or operating installations under contract with the Commission.

At any one time, up to about 150,000 men are working on Commission projects, though not all these employees may have to be cleared.²⁰ The Commission has reported that from 1947 to 1955, 503,810 persons were investigated.²¹

E. INDUSTRIAL PERSONNEL SECURITY PROGRAM

Pursuant to the recent Executive Order 10865, February 20, 1960, the Department of Defense has revised the procedures of its industrial personnel security program, whose denial of the right of confrontation and cross-examination was found invalid for want of Congressional or Presidential authorization in *Greene v. McElroy*, 360 U.S. 474.²² There is still no specific statutory authorization for the program, which covers private firms having defense contracts with the armed services. Approximately 3,000,000 employees having access to classified information are affected.²³

²⁰ Brown, *Loyalty and Security*, pp. 61-62.

²¹ N. Y. City Bar Assn., *Report*, p. 220.

²² Pertinent Defense Department regulations are the Armed Forces Industrial Security Regulation (1960) (for military departments); Industrial Security Manual for Safeguarding Classified Information (1960) (for defense contractors); Industrial Personnel Access Authorization Review Regulation, July 28, 1960 (standards and procedures). The texts of these regulations are contained in BNA Manual, *Government Security and Loyalty*, p. 25:1 ff. Certain procedures under the revised program are discussed in part II-B of this brief, *supra*, p. 13ff.

²³ N. Y. City Bar Assn., *Report*, p. 64; Brown, *Loyalty and Security*, p. 179, n. 16.

One distinctive element of the program, both before and after revision, is of particular concern to unions. The contractor himself can clear an employee for access to Confidential, the most common classification, affecting 2,000,000 employees. And in fulfilling this function some contractors have resorted to illqualified private investigative agencies.²⁴ If management determines that in its judgment there is "derogatory information" about an employee, further processing is left to the military department having security cognizance of the facility. Denial of security clearance need not necessarily mean dismissal for the employee, if the employer is able and willing to transfer him to a "nonsensitive" position. Union experience, however, has been that employers seldom show much sympathy in such situations.²⁵ And of course the opportunities for anti-union employers to abuse this power to weed out undesirable employees are manifest.²⁶

F. PORT SECURITY PROGRAM

The Port Security Program is based on the Magnuson Act of 1957,²⁷ implemented by Executive Order 10173, October 18, 1950, 15 Fed. Reg. 7005, as amended. The program applies to practically all seamen on American merchant vessels and to harbor workers in restricted ports,

²⁴ Brown, *Loyalty and Security*, p. 64.

²⁵ A Director of Security at Republic Aviation has stated: "Fire 'em. That's my answer to anyone who asks me how to handle security risks in his plant." Quoted in Fleischman, Kornbluh, and Segal, *Security, Civil Liberties and Unions*, p. 35 (AFL-CIO, Washington, 1957).

²⁶ A 1952 report issued by the National Industrial Conference Board states frankly:

"Even if you don't have a trained saboteur in hire, Industrial Security can pay off in peacetime. It can help you rid your plant of agitators who create labor unrest, who promote labor grievances, slowdowns and strikes and encourage worker antipathy towards management." (Quoted in Fleischman, Kornbluh, and Segal, *Security, Civil Liberties and Unions*, p. 25.)

²⁷ 64 Stat. 427, 50 U.S.C. §191.

with the standard being that the person's presence "would not be inimical to the security of the United States."²⁸

Administration of the program is the responsibility of the Coast Guard. Certain notice and hearing procedures have already been condemned as a denial of due process in *Parker v. Lester*, 227 F.2d 708 (9th Cir. 1955).

The Coast Guard reported that as of December 31, 1955, clearance under the Port Security Program had been granted to 425,334 seamen and 395,271 longshoremen.²⁹

G. INTERNATIONAL ORGANIZATIONS EMPLOYEES LOYALTY PROGRAM

Executive Order 10422, January 9, 1953, 18 Fed. Reg. 239, as amended by Executive Order 10459, June 2, 1953, 18 Fed. Reg. 3183, established an International Organizations Loyalty Board in the Civil Service Commission. This board makes an "advisory determination" regarding any "reasonable doubt as to the loyalty" of any American employed by the United Nations, its specialized agencies, or the other forty-odd international organizations in which the United States participates. The power of final decision on retention naturally resides with the international organization. As of April, 1956, there were 3,100 American citizens covered by the program.³⁰

H. MILITARY PERSONNEL SECURITY PROGRAM

The present military security programs covering the approximately 2,600,000 members of the armed forces are based on Department of Defense Directive 5210.9, April 7, 1954, as amended.³¹

²⁸ *Report of Commission on Government Security*, pp. 343-345.

²⁹ N. Y. City Bar Assn., *Report*, p. 115.

³⁰ *Id.*, p. 221.

³¹ The DOD Directive, together with the implementing regulations of the Army, Navy, and Air Force, are set forth in BNA Manual, *Government Security and Loyalty*, p. 31:51 ff. For figures on the armed forces, see *World Almanac and Book of Facts*, pp. 734-735 (1959).

There is a huge turnover in the military service. Under the draft, millions of young men are exposed to the rigors of a loyalty-security check without any voluntary action on their part. Furthermore, military personnel remain subject to possible security proceedings even after they have completed active duty, if they are transferred to the reserve. As of September 30, 1956, this subsidiary group of persons covered by the military programs totaled approximately 4,000,000.³²

A special problem is presented by the issuance of less-than-honorable discharges. In *Harmon v. Brucker*, 355 U.S. 579, this Court held that such discharges could not be issued on the basis of an individual's activities prior to entry into the service. This did not necessarily mean that these official stamps of disapprobation will not be affixed on the basis of an individual's activities while in the nebulous reserve status. And of course *Harmon* did not stop the military from applying the brand of dishonor in reliance on the word of secret informers.

I. STATE AND LOCAL LOYALTY-SECURITY ACTIVITIES

Most states and many local communities have devised their own procedures for combating the dangers of subversion.³³ Such loyalty-security inquiries may be classified under three broad headings: (1) public employees' loyalty oaths; (2) administrative programs analogous to those for

³² *Report of Commission on Government Security*, p. 111.

³³ See generally Brown, *Loyalty and Security*, pp. 92-118. At least thirty-two states have adopted one or more of these methods for registering their opposition to the international conspiracy. They are Alabama, Alaska, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Montana, Nebraska, New Hampshire, New Jersey, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Washington, and West Virginia. Cities with special programs include Baltimore, Los Angeles, and New York City.

federal personnel; and (3) loyalty-security inquiries in connection with state licensing and taxing power.

The best estimate is that there are up to 2,500,000 non-professional public employees and up to 1,000,000 professionals (of which the largest group by far consists of public school teachers) exposed to state or local loyalty-security tests of one kind or another, generally of a high intensity.¹ This makes a total ranging perhaps between three and three-and-a-half million individuals.

The number of persons affected by loyalty inquiries connected with the exercise of state or local licensing and taxing powers is unknown.

J. SUMMATION: THE SCOPE^a AND IMPACT OF LOYALTY-SECURITY PROGRAMS

Figures have already been provided for the estimated coverage of each of the broad categories of federal and state loyalty-security programs. In seeking to obtain a combined estimate in round figures for the direct coverage of all the programs at the present time, several special allowances will be made. The two million persons listed by the Civil Service Commission as ineligible for government employment will not be counted. The four million reservists technically subject to the military program will not be counted. No attempt will be made to list a separate figure for that portion of the possibly "several hundred thousand" persons in petitioner Brawner's status who are not covered by any of the formal security programs. Finally, since the only official figures available on the Post Security Program are the total clearances of 800,000, an arbitrary figure of 300,000, or about one-third, will be chosen to represent a rough estimate of current exposure. With these allowances, the result is:

¹ See Brown, *Loyalty and Security*, pp. 166-169, 178.

	<i>In thousands</i>
Federal Civilian Employees	2400
Atomic Energy Commission	150
Industrial Personnel	3000
Port Security	300
International Organizations	3
Military Personnel	2600
State and Local Employees	3500
Total, round off to	12,000

Professor Brown of Yale Law School has provided a different type of tabulation of current loyalty test exposure, figured according to the profession or occupation of the employee rather than the particular governmental program. His totals follow:³³

	<i>In thousands</i>
Professions, including teachers	1600
Managers	300
Government and military	7200
Extractive industry	—
Manufacturing, construction, transport, utilities	4500
Trade, service, finance	—
Agriculture	—
Total, round off to	13,500

These figures include an estimate of about one-and-a-half million persons who are subject to a loyalty-security check by employers acting on their own initiative. Eliminating this group, there are left roughly 12,000,000 persons out of a total working population of 65,000,000 who are presently exposed to loyalty scrutiny of some sort under programs conducted or sponsored by the federal or state and local governments.

Of this vast contingent of 12,000,000 persons, only a small proportion are in positions which can reasonably be

³³ *Id.*, p. 181.

regarded as related to the national security. Restricting its studies to the approximately 6,000,000 persons whom it estimated as being covered by the civilian security programs of the federal government, the Special Committee of the New York City Bar Association concluded that coverage could properly be reduced to less than 1,500,000. The Committee cited official figures to the effect that there are only between 500,000 and 600,000 sensitive civilian federal positions, and only 800,000 positions in the Industrial Security Personnel Program involving access to Secret or Top Secret material.³⁶ Professor Brown estimates that with the military included, the programs with some basis in security considerations now reach between seven and eight million persons. He believes that by restricting coverage to sensitive positions the total embraced by all the security programs could be cut to not much more than 2,000,000.³⁷

From the tangled thicket of official figures Professor Brown has drawn a considered calculation of the total number of dismissals, or denials of clearance equivalent to dismissals, under the various security programs. A summary of his findings is as follows:³⁸

All federal employees, including military	3900
Private employees subject to federal programs	5400
State and local government employees	1000
Self- and privately employed	1200
Total	11,500

From this total should be struck the estimate of 1200 persons who lost employment through private screening.

³⁶ N. Y. City Bar Assn., *Report*, p. 146.

³⁷ Brown, *Loyalty and Security*, p. 253.

³⁸ *Id.*, p. 182. For detailed estimates, see *id.*, Appendix A, pp. 487-488. Detailed statistics from official sources are contained in N. Y. City Bar Assn., *Report*, Appendix A, pp. 219-226.

This leaves a round figure of 10,000 individuals who have been denied clearance in programs operated under governmental authority.

Regardless of whether a charged employee is cleared or not, a security proceeding may be very costly to him in terms of both time and money.³⁹ And almost completely incalculable is the damage to democratic traditions, to employee morale, to the inquiring mind.⁴⁰

In assessing the reasonableness of this quest for security via the testing of ideology,⁴¹ it seems not inappropriate to add one final item to the scales, now that we have placed in the balance the scope and impact of the programs. Measured by the goal apparently aimed at, this is the achieve-

³⁹ In 1955 a sample selection of 326 cases arising under the various federal personnel security programs was collected under the direction of Adam Yarmolinsky on a commission from the Fund for the Republic. At least 65 per cent of the proceedings resulted in clearances. Nevertheless, 65 per cent of the persons under charges were discharged or suspended without pay pending final disposition of the case. About 60 per cent of the cases took more than six months to process. In 25 per cent of the cases counsel fees ranged from \$200 to \$499, and in about 30 per cent they were \$500 or more. Brown, *Loyalty and Security*, Appendix B, pp. 493-494, Tables 13-15, 17.

⁴⁰ A survey of opinion on the "intangible costs" is made in N. Y. City Bar Assn., *Report*, pp. 124-133, 212-215.

⁴¹ That the thrust of questioning in security hearings is primarily ideological will be seen from Brown, *Loyalty and Security*, pp. 42-43, and Appendix B, p. 492, Table 9. Cf. Yarmolinsky, ed., *Case Studies in Personnel Security* (1955).

⁴² Statement of Loyalty Review Board Chairman Seth W. Richardson, "The Federal Employee Loyalty Program," 51 Col. L. Rev. 546-556 (1951); questioning of Civil Service Commission Chairman Philip Young, *Hearings before a Subcommittee to Investigate the Administration of Federal Employers' Security Program of the Senate Committee on Post Office and Civil Service*, 84th Cong., 1st Sess., Pt. 1, pp. 707-708 (1955); Brown, *Loyalty and Security*, p. 36, n. 21. See also cases collected in Department of Defense, *Industrial Personnel Security Review Program, First Annual Report* (1956); Yarmolinsky, ed., *Case Studies in Personnel Security* (1955).

ment of the myriad loyalty-security programs and their array of secret informers: so far as is known, there has been uncovered by these procedures not one single spy or saboteur or revolutionary.⁴²

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief for petitioners, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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No. 97

In the Supreme Court of the United States

OCTOBER TERM, 1960

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAUNER,
PETITIONERS

v.

NEIL H. McELROY, ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 97

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAWNER,
PETITIONERS

v.

NEIL H. McELROY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the district court (R. 132) is not reported. The opinion of the court of appeals *en banc* (Pet. App. 1a-42a; R. 144-181) is not yet reported.¹

JURISDICTION

The judgment of the court of appeals was entered on April 14, 1960 (R. 182). The petition for a writ of certiorari was filed on May 24, 1960, and was granted on October 10, 1960 (R. 200). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

¹ The opinion of the division of the court of appeals (R. 134-139), which was supplanted by the *en banc* decision, will not be reported.

QUESTIONS PRESENTED

1. Whether the commanding officer of a military installation has authority to prohibit, summarily and without a hearing, entrance of an employee of a private contractor into the installation.

2. Whether the exercise of such authority in the circumstances of this case violated the Fifth Amendment to the Constitution.

STATUTES, REGULATIONS, AND MANUALS INVOLVED

The pertinent portions of the statutes, regulations, and manuals involved are set out in the Appendix, *infra*, pp. 89-100..

STATEMENT

Petitioner Rachel M. Brawner was employed as a short-order cook by the M & M Restaurants, Inc., a private company (hereafter called the "Concessionaire") at a cafeteria on the premises of the United States Naval Gun Factory* in Washington, D.C., which is engaged in the development of weapons systems of a highly classified nature (R. 4, 39, 90, 93, 107). The property on which the cafeteria was situated is owned by the United States (R. 105) and is under the command of the Superintendent of the Naval Gun Factory (R. 105; Exhibits C and D, R. 108-112). Access to the Gun Factory is restricted to authorized personnel and is controlled by military guards at all points of access. An identification badge is issued by the Security Officer of the Gun Factory

* Although the name of the Naval Gun Factory officially was changed to Naval Weapons Plant on July 1, 1959, during the course of this litigation, it will be referred to as the "Gun Factory" in this brief.

to persons authorized to enter the premises and must be displayed by those seeking entry (R. 7, 90, 94).

The cafeteria was operated by the Concessionaire under a contract with the Board of Governors of the United States Naval Gun Factory Cafeterias* (R. 5-6). Under a previous contract between the Board and the Concessionaire, which was in effect when petitioner Brawner first began working at the Gun Factory, the Superintendent of the Factory had the power "to cancel, revoke or withdraw" the employment of any of the Concessionaire's employees "for any cause or reason deemed sufficient by the Superintendent or his representative, in the exercise of discretion, without the necessity for any showing of cause" (see Appendix *infra*, pp. ¹⁰¹⁻¹⁰⁷ ~~99-100~~). The Concessionaire was then required to terminate the employment of such person, his identification badge was to be taken up, and he was not to be allowed in the Gun Factory thereafter. The contract in effect when petitioner Brawner's badge was withdrawn stated that the Concessionaire agreed that it would not continue to engage personnel who "fail to meet the security requirements or other requirements under applicable regulations of the Activity as determined by the Security Officer of the Activity" (R. 5-6). The personnel employed by the Concessionaire were members of the petitioner union, Cafeteria and Restaurant

* The Board of Governors is composed of seven civilians who are employed by the Gun Factory and are appointed by the Superintendent of the Gun Factory (R. 6). The contract was therefore in effect between the Concessionaire and the Gun Factory.

Workers Union, Local 473, AFL-CIO, with whom the Concessionaire had a collective bargaining agreement containing a provision that no worker should be discharged "without good and sufficient cause" and also providing for arbitration proceedings to resolve any disputes arising under the contract (R. 18-20).

When petitioner Brawner began working for the Concessionaire, she was issued an identification badge which permitted her to enter and leave the confines of the Gun Factory. On November 15, 1956, at the direction of respondent Lieutenant Commander Williams, the Security Officer of the Gun Factory, petitioner Brawner was required to relinquish her identification badge because of failure to meet the security requirements of the installation (R. 98-99). This action was subsequently upheld by respondent Admiral Tyree, Superintendent of the Gun Factory (R. 59-60). As the basis of his action, Admiral Tyree cited the provision in the contract, entered into between the naval officials and the Concessionaire, that the Concessionaire could employ only personnel who met the security requirements for admittance into the Factory as determined by the Security Officer (Exhibit N, R. 32-33). As a consequence of the withdrawal of her identification badge, petitioner Brawner has not since been permitted access to the premises where the cafeteria is located.

Shortly after the termination of Mrs. Brawner's access to the Gun Factory, Denver E. McKaye, presi-

* Navy Department General Order 257 (November 28, 1945) designates the Superintendent as the Commanding Officer of the Gun Factory (R. 108-109).

dent of the Concessionaire, notified the Business Agent of the Union that his firm would employ petitioner Brawner at another location where his firm operated a food service establishment, i.e., the Skylark Motel in Springfield, Virginia (a suburb of Washington) (R. 131). Mr. Palmer, the Union Business Agent, told Mr. McKaye that the location of this alternate employment was unsatisfactory and therefore refused the offer for petitioner Brawner (R. 131).

The Union took the position that the Concessionaire had discharged petitioner Brawner "without good and sufficient cause" and thereby had violated the collective bargaining agreement between the Concessionaire and the Union (R. 8-9, 20-23, 45-48, 91). Accordingly, the Union demanded arbitration proceedings under the contract. An arbitration hearing was held (R. 34-70), and on August 6, 1957, the arbitration panel held that petitioner Brawner was not discharged by the Concessionaire and that her real grievance was against the government which had denied access to her place of employment (R. 71, 75-76).

On September 6, 1957, petitioners instituted suit in the District Court for the District of Columbia seeking (1) to require respondents⁵ to furnish petitioner

⁵ Besides Superintendent Tyree and Security Officer Williams the other respondents were Neil H. McElroy, the former Secretary of Defense, and Thomas S. Gates, the present Secretary of Defense (formerly Secretary of the Navy). The Concessionaire was named as a defendant in the complaint, but the district court dismissed the action as to it and the court of appeals affirmed. Petitioners have not sought review of these rulings, and the Concessionaire is not a respondent in this Court (see Pet. Br. 20, note 10).

Brawner with an identification badge authorizing her entry upon the premises of the Naval Gun Factory and approval of her reemployment there by the Concessionaire; (2) to require the Concessionaire to reinstate her with all seniority rights, and to pay all loss of salary since November 15, 1956, with interest at 6% per annum; (3) to hold respondents and the Concessionaire jointly and severally liable as individuals for loss of pay since November 15, 1956, with interest at 6% per annum; and (4) to set aside the arbitration award of August 6, 1957 (R. 2, 16-17). After a hearing, the district court denied the plaintiffs' motion for summary judgment, granted the defendants' cross-motion for summary judgment, and dismissed the complaint as to all the defendants (R. 132). A three-judge division of the court of appeals, in a divided decision, affirmed the judgment in favor of the Concessionaire, but reversed the judgment as to respondents here and remanded the case (R. 134-139). On rehearing *en banc*, the full court of appeals held the decision of the three-judge panel erroneous and affirmed the judgment of the district court (R. 144-181).*

* After the decision of the court of appeals was entered, respondent Gates was substituted for respondent McElroy in the capacity of Secretary of Defense. Respondents thereupon moved on May 3, 1960, in the court of appeals for dismissal of the case as to Mr. McElroy in his individual capacity. This motion was granted on June 2, 1960, but because of defective service respondents filed a motion in the court of appeals to reconsider and reaffirm the court's order dismissing as to Mr. McElroy in his individual capacity. Petitioners then cross-moved to vacate the order of June 2, suggesting lack of jurisdiction since a petition for certiorari had been filed in this

The contract under which the Concessionaire operated the cafeteria where petitioner Brawner was employed expired on January 31, 1958, and the Concessionaire no longer operates any cafeteria on the premises of the Gun Factory (R. 107). The new concessionaire, Implant Foods, Inc., has entered into a collective bargaining contract with the Union whereby Implant has agreed to employ petitioner Brawner with full rights if this litigation is decided in her favor (Pet. App. 40a).

SUMMARY OF ARGUMENT

I

Military commanders have the authority summarily to exclude employees of private contractors from their bases. *Greene v. McElroy*, 360 U.S. 474, does not apply to this case.

A. *Greene v. McElroy* held that "explicit authorization" was required for certain procedures of the Industrial Security Program—specifically, the revocation of security clearances of persons employed by private contractors on private property, without confrontation and cross-examination of hostile witnesses. This

Court. The court of appeals reaffirmed its order of June 2 on June 30, 1960.

The two orders of the court of appeals were issued after the petition for a writ of certiorari was filed on May 24, 1960, but before the writ was granted on October 10. Therefore, the dismissal of the case as to Mr. McElroy occurred while the case was still within the jurisdiction of the court of appeals. See *Magnum Co. v. Coty*, 262 U.S. 159; *Waskey v. Hammer*, 179 Fed. 273 (C.A. 9). Since petitioners have not filed a petition for a writ of certiorari from the June 30 order, the dismissal of Mr. McElroy is now final.

unusually strict requirement of authorization by Congress or the President was founded in *Greene* on three basic propositions, none of which is present in this case.

First, this Court repeatedly relied in *Greene* on the uncontradicted evidence that Greene had lost his employment as a result of the loss of his security clearance and that his future employment opportunities had been drastically impaired. In contrast, in the present posture of this case, petitioner Brawner is in the position of a new employee seeking a badge to take employment for the first time. Her old employer no longer has the concession at the Gun Factory and she has been deprived of only the promise of a new job with a new employer by the refusal of respondents to give her a badge.

Even if the case is considered in its posture before the district court, Mrs. Brawner did not lose her employment with her particular employer, let alone all employment in her chosen occupation. Since she was offered a similar position with her same employer not too many miles away, Mrs. Brawner's claim is in reality based on a transfer of positions within the same company, not on full loss of employment. Moreover, Mrs. Brawner was in an occupation having large numbers of employment opportunities, few of which require government clearance. Unlike Greene, she was not deprived of employment in her chosen occupation.

Turning from Mrs. Brawner in particular to the problem as a whole, there is substantially less likelihood of a serious impact on employment opportunities

through loss of access to military bases. The number of civilians employed by private contractors on military bases, while large, is a negligible proportion both of total employment and of employment in the particular occupations involved. The large majority of such persons would not lose their jobs at all since their employers do much of their business off the base and, if they are discharged, they are generally in non-specialized occupations as to which most employment is unconnected with the government.

The second premise of the *Greene* decision is that clearance under the Industrial Security Program was based on a fact determination reached through elaborate hearing and appeal procedures. But no procedures have been established as to control of access to military bases; rather, this decision has always been made summarily by military commanders on the basis of whatever information they could obtain.

The third critical distinction between this case and *Greene* is that there a serious constitutional issue was involved and, for this reason, the Court refused to assume that the administrative action was authorized. As we have said, however, Mrs. Brawner did not have her employment relationship severed, nor did she lose her employment opportunities. But even if the withdrawal of her security badge had left her in a position comparable to the petitioner in *Greene*, the constitutional issue here would still be substantially less serious. The long history of summary control over civilian access to military bases makes clear that private persons have no constitutional right to a hearing before access to a military base is denied.

B. If ordinary standards for measuring delegation of authority are applied, authorization of the summary procedure involved here is clear. But even if the clearer authorization required by *Greene* must be shown, we submit that this criterion has been satisfied.

1. Congress has provided that the Department of the Navy shall be administered by the Secretary of the Navy who has complete authority over its property and has the power to issue regulations which, when approved by the President, have the force of law. In regulations approved and signed by the President, the Secretary provided that commanding officers, such as the Superintendent of the Gun Factory, should impose restrictions on visitors to their commands needed to safeguard classified matter in their custody and that "tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer."

In addition, the Regulations direct the Chief of Naval Operations to issue supplementary security manuals. The Security Manual for Classified Matter provides that "the commanding officer of the activity being visited has full discretion as to whether the visit shall be permitted." The term "visitor" is defined as "any person who is not attached to or employed by the command or staff using that station as headquarters," including "[p]ersonnel of private facilities under contract to the Department of Defense." An employee of a private concessionaire comes within this definition.

2. The summary power of the commanding officer over access to his activity which is clearly authorized

by the statutes, regulations, and manuals is confirmed by the actual practice of military commanders for over a hundred years. This history of summary power by military commanders is so clear that, until this litigation, it appears that it had never been seriously challenged, at least in court. Any arbitrary use of the commander's power has been appealable only to, and reviewable by, superior military and executive authority. In fact, it is well settled that the executive lacks power, without specific authorization by Congress, to create any right to use a military base which is not revocable at will. Accordingly, the burden is on the petitioners to show that Congress has authorized or required the executive to surrender its inherent power to revoke at will any license to enter military bases; the burden is not on the executive to show specific authorization for the power to revoke.

II

If, as we have said, Mrs. Brawner did not lose her job but was merely transferred, and did not lose her employment opportunities, there is no substantial constitutional question. Assuming, however, *arguendo*, that she was more seriously affected, the basic constitutional question is whether the interest in being permitted access to a military base, and thus being able to work, is "liberty" or "property" entitled to the procedural protections of the Fifth Amendment. That question depends not only upon the substantiality of the injury resulting from governmental action, but also upon the nature of the interest affected.

A. In controlling access to military bases, the Government acts in a proprietary capacity—i.e., in the management and protection of property committed to its custody for governmental use. Private persons are allowed access to such property solely for the convenience of the government, and they acquire no interest that can be described as more than a permissive use. It is not an interest that has traditionally been accorded legal protection.

1. Action taken by the government in the control of its own property is very different in nature from the exercise of a legislative or regulatory power affecting the legal rights and duties of private persons at large. In the cases involving private employment, relied upon by petitioners, the governmental interference was of the latter type, imposing a legal disability upon the person affected (e.g., by denial of a license required to engage in an occupation, *Parker v. Lester*, 227 F. 2d 708 (C.A. 9)). Even assuming that the practical consequences to Mrs. Brawner of the government's denial of access to a military base might be the same in some instances as a legal bar to her employment in the cafeteria or restaurant industry, the distinction between the nature of the interests involved is deeply rooted in our law. See *Perkins v. Lukens Steel Co.*, 310 U.S. 113.

2. Governmental action may, however, be subject to certain kinds of constitutional restraints even though the interest affected does not appear to be otherwise legally-protected. Although there is no "right" to government employment, this Court has observed that "Congress may not enact a regulation providing that

no Republican, Jew or Negro shall be appointed to federal office.' " *United Public Workers v. Mitchell*, 330 U.S. 75, 100. See also *Wieman v. Updegraff*, 344 U.S. 183, and *Slochower v. Board of Education*, 350 U.S. 551, holding unconstitutional dismissals from state employment on the basis of an arbitrary statutory standard. The underlying basis of these cases, we submit, is that there is an affirmative right granted by the Constitution for one to be free of certain kinds of invidious discrimination by the state, regardless of the nature of the interest affected—a concept, although part of "substantive" due process, closely akin to that of the equal protection clause. The same is not true, however, of "procedural" due process; procedure is not an end in itself and some substantive interest must first be recognized before procedural due process can be claimed. Thus, there remains the problem of defining the kinds of interests qualifying as "life, liberty, or property," and of determining whether Mrs. Brawner's interest falls in that class.

B. Recognition of Mrs. Brawner's interest in obtaining access to the Gun Factory as "property" or "liberty" entitled to constitutional protections would inevitably require a departure from the traditional reluctance of the courts, because of considerations implicit in the constitutional separation of powers, to interfere with the internal affairs of the government. See *Decatur v. Paulding*, 14 Pet. 497, 516. One such area of noninterference has been in the award of contracts. Another is the removal of government employees, the history of which was summarized in *Bailey v. Richardson*, 182 F. 2d 46, 57 (C.A.D.C.),

affirmed by an equally-divided Court, 341 U.S. 918: "Never in our history has a Government administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service." And the summary power of the executive to control persons desiring to come on or use government property is even more clear. Whether exercised by Congress or the executive, the government has absolute control over property of the United States and, under this power, may exclude persons who have been using such property even when this causes pecuniary damage.

What is true of the executive's power to make contracts, to dismiss government employees, and to decide who may come on or use ordinary government property is true with redoubled force of the power to say which private persons have access to military bases, for here we are dealing with the most vital interests of the nation. In no area are the constitutional responsibilities of the executive branch any greater or any clearer; if there are to remain any powers of the executive free of procedural restraint, they must include the absolute control of access to military institutions. And in no area is the history of summary action of the executive—which has not been judicially challenged until now—more clear.

C. If Mrs. Brawner's interest in obtaining access to the Gun Factory is not itself a right entitled to constitutional protection, it is not made so by the alleged consequential injury to reputation. The governmental action taken was the minimum necessary to withdraw the badge from her. The government has never published the action taken; and there was no gratuitous

labelling nor any characterization attributed to Mrs. Brawner beyond that inherent in the action itself. Moreover, the withdrawal of the badge was for "security reasons" which include such characteristics as being accident-prone, garrulous, or dishonest. But even insofar as "security reasons" might conceivably relate to information of disloyalty, the withdrawal of Mrs. Brawner's badge is not a determination of fact but at most implies only a doubt of her reliability. In short, since the government's denial of access to the base was otherwise lawful and privileged as an exercise of its right to control its own property, it was not made unlawful by the possible consequential damage to reputation. And in any event, Mrs. Brawner's right to the relief she seeks—restoration of access to the Gun Factory—must be predicated upon a right to that access as such. If the only protected interest is the interest in reputation, that relief would be inappropriate.

ARGUMENT

INTRODUCTION

Petitioners seek a judicial order requiring respondent government officials to return Mrs. Brawner's identification badge and thereby allow her access to the Naval 'Gun Factory.' The basic conten-

'Petitioners' additional claim for relief against respondent government officers (which petitioners do not argue in their brief)—that they be held jointly and severally liable for loss of pay—is plainly frivolous. Their action, whether or not authorized, was clearly taken in the performance of their official duties. It was therefore absolutely privileged from civil liability. See, e.g., *Barr v. Matteo*, 360 U.S. 564; *Howard v. Lyons*, 360 U.S. 593; *Gregoire v. Biddle*, 177 F. 2d 579 (C.A. 2), certiorari denied, 339 U.S. 949. The other relief sought by

tion is that the commanding officer of a military base lacks authority summarily to prohibit the entrance of employees of a private contractor onto the base. Petitioners further argue that, even if Congress or the President gave commanding officers such authority, this action would be unconstitutional. Petitioners are thus claiming that there is a constitutional right of private citizens to enter a military base unless charges are brought against them justifying their exclusion and unless a hearing is afforded in which the charge can be rebutted. Stated in the words of the court of appeals, the "narrow" issue before the Court is "the nature and extent of the power of a naval officer in command of a naval installation to control the ingress and egress of civilians to and from the premises.

* * * The case does not involve debarment from a chosen occupation. It is not a discharge case. The case does not involve any personnel Security Program, with its concomitant regulations" (R. 147-148).

We submit that the petitioners' contentions are fundamentally inconsistent with the course of our history as a nation. Military officers have been summarily controlling entrance of non-military men to their commands since the beginning of this country's armed forces. This power has been assumed and exercised without challenge prior to this litigation. Indeed, so far as we have been able to ascertain, no person prior to this case has ever brought a judicial proceeding claiming any right to enter a military base.

petitioners in their complaint (see *supra*, pp. 5-6) is directed to petitioner Brawner's employer, which is not a party in this Court.

This unbroken and long-standing history, based as it is on the underlying need of the military to have full control over military posts; far outweighs any *a priori* deductions now sought to be derived from distantly analogous situations and principles. But, in any event, as we will show, the authority of commanding officers summarily to control entrance to military bases is established not merely by history, but by executive orders and statute, and is consistent with the Constitution.

I

MILITARY COMMANDERS HAVE THE AUTHORITY SUM-
MARILY TO EXCLUDE EMPLOYEES OF PRIVATE CONTRAC-
TORS FROM THEIR BASES

Petitioners contend (Pet. Br. 27-66) that the decision of the court of appeals upholding the action of the military commander is in conflict with *Greene v. McElroy*, 360 U.S. 474, in which this Court held that "in the absence of explicit authorization from either the President or Congress the respondents [in that case] were not empowered to deprive petitioner of his job in a proceeding in which he was not afforded the safeguards of confrontation and cross-examination" (*id.* at 508). Petitioners reason that Mrs. Brawner was likewise deprived of her job with a private employer without confrontation and cross-examination—without even any hearing at all—and that such a procedure was not explicitly authorized. We submit, however, that the *Greene* case is controlled by factors which are not present in the instant case. Moreover, even if the *Greene* principle is thought applicable,

the relevant statutes and regulations, coupled with the long history of plenary control by military commanders over access to military installations through summary orders, constitute the clear authorization which would be required.

A. *GREENE v. McELROY* IS INAPPLICABLE TO THIS CASE: EXPLICIT AUTHORIZATION IS NOT NECESSARY FOR COMMANDERS SUMMARILY TO CONTROL ACCESS TO MILITARY BASES

In *Greene v. McElroy, supra*, the Court considered the authority underlying certain procedures of the Industrial Security Program—the revocation of security clearances of persons employed by private contractors on private property without any provision for confrontation and cross-examination of hostile witnesses. While making clear that these procedures would be held to be authorized if one were to apply ordinary standards of delegation of authority (360 U.S. at 506), the Court held that “explicit authorization” was required for non-confrontation procedures, in view of the nature of the interests affected (360 U.S. at 507, 508). In our view, the imposition in *Greene* of this strict rule as to authorization was founded on three basic propositions, none of which is present in this case.

1. First, in *Greene*, the evidence was uncontradicted that the employee had been trained in the specialized field of aeronautical engineering and had spent all his professional life in this field; that he had lost his employment as a result of the revocation of his security clearance since his employer had no work not requiring such a clearance; and that he was unable to obtain a new position in the aeronautics field. Thus.

he was forced to leave a job paying \$18,000 per year and to accept a position paying \$4,700. In the light of these facts, the Court stated that "the issue, as we see it, is whether the Department of Defense has been authorized to create an industrial security clearance program under which affected persons may lose their jobs and may be restrained in following their chosen professions * * *" in proceedings in which the opportunity for confrontation and cross-examination is not afforded. 360 U.S. at 493. Similarly, the opinion later describes the situation before the Court as "Governmental action [which] seriously injures an individual * * *" (*id.* at 496), "an industrial security program which can operate to injure individuals substantially by denying to them the opportunity to follow chosen private professions * * *" (*id.* at 500), "security programs whereby persons are deprived of their present civilian employment and of the opportunity of continued activity in their chosen professions * * *" (*id.* at 502), "programs under which persons may be seriously restrained in their employment opportunities * * *" (*id.* at 502-503), "substantial restraints on employment opportunities of numerous persons * * *" (*id.* at 506), and a program by which "a person may be deprived of the right to follow his chosen profession" (*id.* at 507). And, in concluding, the Court reiterated that "the petitioner's work opportunities have been severely limited * * *" and that "respondents were not empowered to deprive petitioner of his job * * *" (*id.* at 508). In sum, the Court relied heavily on the important interest of employees such as Greene in earning a satisfactory livelihood.

The situation in Mrs. Brawner's case is quite different. In the first place, the main relief sought by petitioners was the restoration of Mrs. Brawner's badge so that she could be employed by M & M at the Gun Factory. But, since the M & M company no longer has a contract to operate a cafeteria at the Gun Factory, the present posture of the case is that the return of Mrs. Brawner's badge could not possibly restore her job with M & M.* While petitioner Union has a collective bargaining agreement with the new concessionaire to hire Mrs. Brawner if her badge is returned, she is in effect now in the position of a person seeking access to the base in order to assume *new* employment. In other words, as the case comes before this Court, Mrs. Brawner, far from seeking access to the base in order to protect an old job, is attempting to secure new employment with a new employer by having her badge restored.'

*The present relationship of the M & M company to the Gun Factory is important because the restoration of Mrs. Brawner's badge is necessarily prospective.

*Recent events also suggest that this case, as it relates to restoration of Mrs. Brawner's badge, may possibly become moot, or of greatly diminished importance insofar as Mrs. Brawner is concerned. The Defense Department has announced that the Gun Factory will no longer operate as an industrial plant (although it will remain a naval installation), thereby causing a gradual reduction in the civilians employed from 5970 during the summer of 1960 to 4309 at present (January 1, 1961) to probably 2300 in January 1962. The number of workers in the cafeteria will be reduced proportionally as employees in the Gun Factory are discharged, so that by January 1962 over one quarter of the cafeteria workers will no longer be needed. It is therefor possible, but not certain, that Mrs. Brawner would lose her position at the Gun Factory within the next year or two even if a badge were now given her.

Even if the case is considered in its posture before the district court, Mrs. Brawner cannot claim that her relationship with her employer was severed, let alone that she was denied all employment in her chosen occupation. She was told by the Concessionaire that she could no longer work at the particular cafeteria in the Gun Factory, but she was also offered employment in another cafeteria operated by her employer not too many miles away. The denial of access to Mrs. Brawner meant, in reality, a transfer of positions within the same company and not the loss of her employment.¹⁰ Her refusal to accept the transfer because of inconvenience does not measure up to the drastic interference with employment, and employment opportunities, involved in *Greene*.¹¹ More-

¹⁰ Compare the concurring opinion of Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 181:

The security problem, however, relates only to those sensitive areas where secrets are or may be available * * *. The department heads must have leeway in handling their personnel problems in these sensitive areas. * * * One can be transferred from those areas even where there is no more than a suspicion as to his loyalty.

Here, petitioner Brawner was clearly in an area where secrets might be available even though she had no right of access to such information. See also the concurring opinion of Mr. Justice Douglas in *Peters v. Hobby*, 349 U.S. 331, 352, which implies that a government employee could be transferred so that he could not see classified information, in circumstances where the information could not be used to discharge him.

¹¹ Petitioner claims (Pet. Br. 93-94) that it would have taken her an hour and a half each way to reach the new job from her home. Many persons travel an hour or more to and from their jobs. And, at most, the new job would require a change of residence, in contrast to the loss of employment in an entire occupation as in *Greene*.

over, it is significant that Mrs. Brawner, unlike *Greene*, was in an occupation having many positions, few of which involve government clearance of any kind. Thus, she was not deprived generally of employment opportunities in her chosen occupation, as the Court found *Greene* to have been. In short, petitioner Brawner's situation, as the court of appeals succinctly described it, was (R. 159-160):

She was not discharged. She was not debarred from her chosen occupation. She was offered a similar job by her same employer, and she refused. There are scores of places open to short-order cooks here and elsewhere. The essence of her claim is that the site of her employment cannot be changed unless charges are made against her and she has a full hearing with witnesses, etc.

Turning from Mrs. Brawner in particular to the problem as a whole, it is evident that there is substantially less likelihood of a serious impact on employment opportunities through loss of access to military installations than through denial of a security clearance for access to classified information. The number of civilians employed on military bases by private contractors, while large, is a negligible proportion both of total employment and of employment in the particular occupations involved. The large majority of such persons are in non-specialized service occupations—delivery men of all sorts (milk, laundry, fuel, military supplies, etc.), repairmen, salesmen, cafeteria workers, and the like—as to which most employment within the United States is totally unconnected with the government. Thus, even when

denial of access to a military base actually results in an employee's loss of his job, it is unlikely to result in barring him, as in *Greene*, from his occupation as a whole. And many such persons, like Mrs. Brawner, would not lose their jobs at all because their employer has substantial business, and therefore jobs, outside the military base.¹²

2. The second fundamental premise of the *Greene* decision is that, under the Industrial Security Program, clearance is denied only on the basis of a fact determination reached through elaborate hearing and appeal procedures. The Court stated that it is a general principle of American jurisprudence that "where governmental action seriously injures an individual, *and the reasonableness of the action depends on fact findings*, the evidence used to prove the Government's case must be disclosed to the individual so that he has the opportunity to show that it is untrue" (emphasis added) (360 U.S. at 496). The Court also stated that "petitioner's work opportunities have been severely limited on the basis of a *fact determination* rendered after a hearing which failed to comport with our traditional ideas of fair procedure" (emphasis added) (*id.* at 508). The Court concluded that the requirement of fact findings assumes that the usual incidents and protections of American law will be

¹² Contrary to petitioners' suggestion (Pet. Br. 90), the distinction between this case and *Greene* discussed above does not discriminate against persons with "menial" jobs. The kind of job is unimportant in itself; what is important is whether the persons affected by the government action will normally lose their present employment and future employment opportunities.

afforded in reaching these findings, unless there is explicit provision to the contrary.

In contrast to the Industrial Security Program involved in *Greene*, no procedures have been established for determining access to military installations through fact determinations. Rather, now, as throughout our history (see *infra*, pp. 37-55), military officers exclude persons from their commands without any procedure, simply on the basis of whatever information they have or can obtain. Since these decisions have not been based on "fact findings" in any real sense, there is no ground for assuming here—as in *Greene*—that the normal procedural concomitants of factual findings must be accorded the individual adversely affected, unless the President or Congress have explicitly authorized a different procedure.

3. The third critical distinction between this case and *Greene* is that, in our view, no constitutional issue of the magnitude of that in *Greene* is involved here. It is clear that the ruling in *Greene* rests in considerable measure on the conclusion that the "administrative action has raised serious constitutional problems" and that for this reason the Court will not lightly assume that the action was authorized. 360 U.S. at 507; see also *id.* at 492, 496-497, 508. However, as we indicate below (pp. 57-58), these constitutional problems arise almost entirely from the fact that the petitioner in *Greene* lost both his present employment and his employment opportunities—circumstances which do not exist in this case. But, even if the withdrawal of Mrs. Brawner's badge had in fact left her in a comparable position to the petitioner in *Greene*,

the constitutional issue raised in the instant case would nevertheless be far less substantial. The long and unbroken history of summary control over civilian access to military bases shows, we submit, that petitioner Brawner had no constitutional right to a hearing before access was denied (see *infra*, pp. 77-78). Civilians have been, and can validly be, excluded from military posts without any hearing or trial—and for a large and varied number of reasons. That is a critical difference.”

B. EVEN IF EXPLICIT AUTHORIZATION IS REQUIRED, THIS STANDARD HAS BEEN MET

We have shown that the basic factors upon which the Court relied in *Greene v. McElroy* are not involved in this case. There is, therefore, no basis for imposing the strict standard of *Greene* for finding authorization by the President or Congress of the procedures followed in denying petitioner Brawner access to the Gun Factory. Under ordinary standards for measuring delegation of authority, authorization for summary action is clear. But, even if the decision in *Greene* does apply and clear authorization must be shown, we submit that this criterion has been satisfied.

1. *The Constitution, statutes, regulations, and manuals.*—(a) The Constitution gives Congress broad powers to legislate concerning the Navy in general and

“Even if a serious constitutional issue were involved here, we do not believe that this fact alone, in the absence of at least the other two underlying premises of the *Greene* decision we have discussed, would be enough to bring this case within the requirements of “explicit authorization” provided in *Greene*.

naval bases in particular. Article I, Section 8, grants authority to Congress to "provide and maintain a Navy" (clause 13); to "make Rules for the Government and Regulation of the land and naval Forces" (clause 14), to legislate concerning military installations (clause 17); and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers * * *" (clause 18). Similarly, Article II, Section 2, by making the President Commander in Chief of the armed forces, gives him broad powers over the Navy and its bases.

Congress has provided that the Secretary of the Navy "shall administer the Department of the Navy" and shall have complete authority and charge of all property of the Department (10 U.S.C. 5031(c), Appendix, *infra*, p. 91). As part of this authority, the Secretary of the Navy has been given the power to issue regulations for "the custody, use, preservation of the * * * property" of the Department (5 U.S.C. 22, *infra*, p. 89; 10 U.S.C. 6011, *infra*, p. 91). These Regulations, like "Army Regulations, when sanctioned by the President, have the force of law * * *." *United States v. Eliason*, 16 Pet. 291, 301-302. See also, *e.g.*, *United States v. Freeman*, 44 U.S. 556, 566; *Standard Oil Co. v. Johnson*, 316 U.S. 481, 484.

Regulations promulgated by the Secretary, and specifically approved by the President," state that "[t]he

¹⁴ The cover sheet of the Regulations was signed by President Truman following the word "approved" (see *infra*, p. 92). Navy regulations are required to be so approved. 10 U.S.C. 6011, *infra*, p. 91.

responsibility of the commanding officer for his command is absolute," that he must "[e]xert every effort to maintain his command in a state of maximum effectiveness for war service," and that he is "responsible for the control of visitors to activities of the Department of the Navy and shall comply with the relevant provisions of the U.S. Navy Security Manual for Classified Matter and other pertinent directives." Navy Regulations (1948), Articles 0701, 0704, 0733, *infra*, p. 93. Furthermore, "[c]ommanding officers shall take such measures and impose any restrictions on visitors as necessary to safeguard the classified matter under their jurisdiction" (Article 0733, *infra*, p. 93).

More specifically, the Navy Regulations provide that "[i]n general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer" (Article 0734, *infra*, pp. 93-94). One of the purposes for which commanding officers may admit such persons is "[t]o furnish services and supplies which are necessary and are not otherwise, or are insufficiently available to the personnel of the command" (*ibid.*). Since Mrs. Brawner was the agent of the tradesman who was furnishing meals at the Gun Factory, she clearly comes within the scope of Article 0734 as a visitor. These regulations prohibit the admission of persons in the class of Mrs. Brawner except for certain stated purposes and only when authorized by the commanding officer. Thus, the regulations, in themselves, constitute full authority for denying Mrs. Brawner access to the Gun Factory unless the Superintendent

considers her admission necessary or desirable for one of the permitted purposes.

In addition, the Navy Regulations direct the Chief of Naval Operations to "supplement these regulations with detailed instructions to insure the proper control of classified matter. Such instructions shall include the United States Navy Security Manual for Classified Matter * * * and such others as may from time to time be issued—all such publications shall have the full force and effect of these Regulations" (Article 1502, *infra*, p. 94). The Navy Security Manual for Classified Matter, which was issued by the Chief of Naval Operations on October 2, 1954,¹³ provided that "[o]fficers in a command status shall be responsible for the security control of visitors within the limits of their jurisdiction," "shall promulgate such additional directives as are necessary for the control of visitors within their respective commands," and shall be responsible, with regard to visits "by persons who will not have access to classified matter," "for the decisions and conditions under which such visits are permitted" (Sections 1401, 1404 (R. 116, 117-118)). And then, even more comprehensively, the Manual states that "[t]he commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted" even when the visit has been approved by a higher command (Section 1409 (R. 119)).

¹³ This manual was superseded, subsequent to the denial of access to petitioner Brawner, by Navy Security Manual for Classified Information (March 10, 1958). The provisions of the earlier manual, upon which we rely, are substantially unchanged. See Navy Security Manual for Classified Information, Sections 1401-1404, 1407-1408, *infra*, pp. 95-98.

A "visitor to a naval shore establishment" is defined in the Manual as "any person who is not attached to or employed by the command or staff using that station as headquarters" (Section 1402 (R. 116)). This broad definition is further divided into categories which include United States citizens who are "[p]ersonnel of private facilities under contract to the Department of Defense" (Section 1403 (R. 116-117)). Petitioner Brawner comes within this definition of visitors since she is neither attached to nor employed by the naval command of the Gun Factory but rather is one of the personnel of a private facility. In fact, petitioners admit that Mrs. Brawner was not employed by the naval command but say that she "would seem to be 'attached' to" it (Pet. Br. 49). This suggestion, however, is not supported by any authority and is contrary to ordinary military usage. The Naval Civilian Personnel Instruction 790.3-8f, issued on September 6, 1957, states under the general heading of Food Services:

The services operated by concessionaires are classed as private enterprises; they acquire none of the status of a government instrumentality and their employees have the same legal status as do employees of any private employer.

Petitioners, however, claim (Pet. Br. 47-49) that Section 1411 of the Manual, *infra*, pp. 94-95, excludes Mrs. Brawner from the definition of a "visitor" since it requires that visitors be escorted, which Mrs. Brawner never was. But Section 1411 requires only that visitors with access to classified information—which peti-

tioner did not have—be escorted.” First, this is the clear implication of statement in Section 1411 that “[e]scorts’ are responsible to commanding officers to assure that the visitor has access to only that information for which he has been authorized.” Second, Section 1407 of the Navy Security Manual for Classified Information, *infra*, p. 97, which is the successor to Section 1411 of the Manual for Classified Matter, explicitly states, with no apparent intent to change the meaning, that escorts for visitors are used only to protect classified materials.” And lastly, Section 1404 of the Manual for Classified Matter (R. 117), states that visitors making unclassified visits need escorts if they are American citizens who represent a foreign military service, government, or private interest or if they are foreign nationals. Such a requirement would hardly be necessary, if, as petitioners claim, all visitors need escorts.^{17a}

¹⁶ Of course, visitors having security clearances under the Industrial Security Program—which is applicable to persons, having access to security information, who are employed by private contractors on military bases as well as off—do not need to be escorted.

¹⁷ In addition, Section 1407 of the new Manual makes escorts discretionary.

^{17a} Petitioners also claim (Pet. Br. 50-53) that Section 1501 of Chapter 15, *infra*, p. 95, of the Manual provides that security investigations of persons employed by private contractors are conducted under the Industrial Security Program and this program is inapplicable to petitioner Brawner since it covers only persons with access to classified matter. We agree and, indeed, emphasize (see *infra*, pp. 34-37) that the Industrial Security Program is inapplicable to Mrs. Brawner in terms and because both the title to Chapter 15 and Section 1501 itself make clear that Section 1501 applies only to persons “requiring

The broad power of commanding officers contained in the Security Manual for Classified Matter, to exclude persons from their commands at their discretion, is confirmed by the Navy Physical Security Manual, which was issued by the Chief of Naval Operations on April 14, 1956. This Manual states that "[t]he Commanding Officer is responsible for the security of all property and installations within his command. He prescribes the security measures to be adopted, and coordinates when necessary the measures adopted by subordinates, but he alone remains responsible for the overall security of his command" (Section 0154, *infra*, p. 98). The commanding officer is granted authority to delegate "the administration and operational aspects of security" to a Security Officer (Section 0156, *infra*, pp. 98-99). Thus, Commander Williams had the authority, as Security Officer of the Gun Factory, to withdraw petitioner Brawner's identification badge—a decision which was upheld by the Superintendent of the base.

Again, petitioners contend (Pet. Br. 53-56) that Mrs. Brawner does not come within the definition of "visitor" in Sections 0540 and 0542 of the Physical Security Manual, *infra*, pp. 100-101. These sections define a "visitor" as a person including employees of a private contractor who have infrequent or temporary access to security areas, and Mrs. Brawner was never authorized to have access to security areas (R. 99). But the definition explicitly applies only "[f]or the

access to classified matter." However, petitioners' conclusion that persons in Mrs. Brawner's position are therefore "to be let alone" does not follow.

purpose of this manual" (Section 0540) and therefore does not apply to the Manual for Classified Matter which has its own definition.

Moreover, the definition of "visitor" in the Physical Security Manual specifically includes employees of private contractors. It demonstrates that the term "visitor" does not itself imply that persons, like Mrs. Brawner, who are employed by private contractors are not included. Insofar as the definition of visitor in that Manual includes only persons with access to security areas and information, its explicit language to this effect supports our contention that the very different definition in the Manual for Classified Matter (see *supra*, p. 29; R. 116-117) includes employees of private contractors who have no such access.

(b) We have described above (*supra*, pp. 25-32) the direct authority of naval officers to exclude civilians, in their discretion, from naval bases—as conveyed by the Constitution, statutes, regulations, and manuals. In addition, Congress has impliedly recognized the existence of this authority in two criminal statutes. 18 U.S.C. 1382, *infra*, p. 92, makes it unlawful to enter or be found within any military base "after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof * * *." The Army Judge Advocate General's Office has on at least two occasions construed this statute as implying the power of commanding officers to exclude persons from military bases (see *infra*, pp. 44, 51). The Internal Security Act of 1950, 50 U.S.C. 797, makes unlawful the violation of any "regulation or order" issued "by any military commander designated by the Secretary

of Defense * * * for the protection or security of" naval bases relating to "the ingress thereto or egress or removal of persons therefrom." On August 20, 1954, the Secretary of Defense promulgated Department of Defense Directive No. 5200.8 (R. 119-122), designating commanding officers of all naval installations as authorized to promulgate regulations for the protection or security of military property as contemplated in the Internal Security Act.

(c) Petitioners argue (Pet. Br. 58-65) that the administrative materials relied upon above—the Navy Regulations and Manuals—were not published in the Federal Register as required by Section 3(a) of the Administrative Procedure Act, 5 U.S.C. 1002(a). They claim, therefore, that respondents are precluded from relying on these materials.

While Section 3(a) provides for the publication of "descriptions of [every agency's] central and field organizations including delegations by the agency of final authority," it begins by explicitly stating that the requirement of publication is not required for "any matter relating solely to the internal management of an agency." The regulations and manuals cited in this brief to support respondents' authority relate entirely to the power to exclude persons from the confines of military bases. This power does not relate to the general public, but instead on its face concerns the internal management of the Navy and particularly of the Naval Gun Factory."

¹⁸ There would be little reason for publication since the regulations and manuals do not provide a procedure to be followed, and of which advantage can be taken by the public. On the

Furthermore, Mrs. Brawner cannot claim that she had no notice of her vulnerability to summary removal of her badge. She knew that her job was on a military installation and that clearance by the Security Officer, as evidenced by issuance to her of an identification badge, was required in order for her to reach her place of employment. At the time of her employment she had been required to file an "Application to Security Officer for Pass" (R. 66-67, 99). And if there was any responsibility to give notice of the specific limitation in the contract with the Gun Factory—by which the Concessionaire agreed not to employ persons who did not meet security requirements—it would rest on Mrs. Brawner's employer, the Concessionaire.

(d) Petitioners also base an elaborate argument on procedures used in other circumstances. They insist that, if Mrs. Brawner had had access to security information (Pet. Br. 31-41) (whether employed by a private contractor on or off a military base), or if she had been a government employee (Pet. Br. 42-46), the government would have been required to give her notice and some kind of hearing under applicable statutes and regulations. But, of course, Mrs. Brawner is in neither of these categories and cannot take advantage of whatever procedures are afforded persons differently situated. And, contrary to petitioners' assertion, those provisions lend no support to the curious proposition that persons not covered by

contrary, we have emphasized that naval commanders have summary power and no procedures for persons affected are given.

these procedures were meant to be left entirely free from denial of access to the base, i.e., "are to be let alone" (Pet. Br. 41). Both the Industrial Security Program and the various protections given to government employees were introduced to provide formal procedures in certain instances where, previously, governmental action had been taken summarily. As we will show (see *infra*, pp. 37-55), governmental action as to access to military bases has always been summary. The only proper inference which can be drawn from the fact that Congress or the President have provided for procedural protections for government employees and employees of private contractors with access to security information, but not for others like Mrs. Brawner, is that the summary power of military officers to control access to their commands has been left intact.

To the claim that it is illogical for procedures to be afforded to employees of private contractors working on military bases who have access to classified information but not to such employees without access, it is a complete answer that Congress or the President have provided for procedural protections in certain situations and not in others. Unless the Constitution requires these procedures (see *infra*, pp. 57-88), they cannot be extended to circumstances to which they have not been applied by the legislative or rule-making authorities. In any event, employees without access to classified information are not given less procedural protection, with respect to access to the military bases, than those with such access. The regulations and manuals give commanding officers full dis-

cretion in admitting visitors to military bases whether they will have access to classified information or not. The only difference is that visitors with access to classified matter need authorization from the Chief of Naval Operations under special procedures. Naval Security Manual for Classified Matter, Section 1404 (R. 117-118). Separate from such authorization, however, employees of private contractors with access to classified matters also need clearance under the Industrial Security Program (Section 1501, *infra* p. 95). If a commanding officer of an installation wishes to exclude such an employee, he can do so summarily. But the employee may continue to have access, off the base, to classified information possessed by his private employer unless his security clearance is removed under the procedures of the Industrial Security Program (as presumably would be done).

Moreover, even if petitioners are correct that employees of private contractors working on military bases with access to classified material have greater protection, in that they are entitled to hearings before they can be denied entrance to the base, this is not illogical. First, most persons who are employed on military bases by private employers do not have access to classified information. Instead, they are generally in such non-specialized service occupations as laundrymen, milk truck drivers, and cafeteria workers (see *supra*, p. 22). Thus, the present system of regulations which affords procedural protections only to certain civilian employees of private contractors leaves the military substantially in its traditional position of being able summarily to control entrance to military

bases—control which has been deemed throughout our history essential for efficient military operations. If petitioners are right, the grant of procedural protections to employees of private contractors with access to security information, whether working on a military base or in a private factory, would grant all *such* employees the same procedures rather than making the applicable protections depend on the circumstance that the individual was employed off rather than on a military base.

Second, as we have also shown above (pp. 21-23), most persons employed in positions without access to classified information are not so drastically affected by denial of access to military bases and therefore have less need for procedural protections. Many such persons, such as laundry or milk truck drivers, do not spend all or even most of their working time on the base; or, such as petitioner Brawner, they work for employers who can transfer them to positions not requiring access to military bases; or, like repairmen and many construction workers, they will lose only temporary employment by not being allowed to enter a base. Thus, many, if not most, persons who have non-security jobs with private employers, and who may be denied access to military bases, will not even lose their present employment. And most of them who do would appear to have non-specialized employment and would therefore have less difficulty in gaining substantially similar employment elsewhere.

2. *The history of control of access to military bases.*—The statutes, regulations, and manuals discussed above (pp. 25-33) give complete authority to the

commanding officer to decide security matters in general and, more particularly, give him full power to select or screen those persons who shall have access to the installation. This authorization is confirmed by the actual practice of military commanders throughout our history; they have regularly exercised authority to admit or exclude civilians selectively, as they deemed appropriate at the time." Indeed, it appears that until this litigation it had never been seriously suggested, at least in court, that military commanders lacked authority summarily to exclude persons seeking to enter their commands. And the very contract between the Gun Factory and the Concessionaire, when Mrs. Brawner first came to work at the Factory, provided that the Superintendent could cancel the employment and withdraw the badge "for any cause or reason deemed sufficient by the Superintendent * * * in the exercise of discretion without the necessity for any showing of cause" (see *infra*, pp. 101-102).

The first explicit formulation (in printed form) of the power of military officers to decide at their discretion who will be allowed to enter their commands is apparently that given by Attorney General Butler in 1837 (3 Op. Atty. Gen. 268). The opinion concerns generally the power of the Superintendent of West Point to exclude civilians who were resident at the Military Academy or who wished to visit the hotel, public wharf, or post office at the Academy. More

¹⁰ On the other hand, in *Greene*, the Court noted that, prior to World War II, only "sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense." 360 U.S. at 493. "

specifically, the issue before the Attorney General was the Superintendent's power to exclude one Avery who lived in a house on the Academy grounds and who had in fact been physically excluded by order of the Superintendent. But before deciding this issue, Attorney General Butler stated that the position of the Superintendent was that civilians have no right to enter the Academy limits (*id.* at 269):

[H]e has always regarded the citizens resident within the public limits—such as the sutler, keeper of the commons, tailor, shoemaker, artificers, etc., even though they own houses on the public grounds, or occupy buildings belonging to the United States * * *—as *tenants at will*, and liable to be removed whenever, in the opinion of the superintendent, the interests of the academy require it. “This,” he observes, “has been the practice since I have been in command; and such, I am told, was the usage under the administration of my predecessors.” [Emphasis in original.]

It is thus clear that long before 1837 military commanders had assumed that they had the power, and had actually exercised it, to exclude at will persons who earned their living by working on military bases.

Attorney General Butler confirmed virtually in entirety the power which the Superintendents of West Point had exercised. He stated that “no person can be entitled, as a matter of right, to enter within the limits of this post, unless he be authorized to do so by the laws of the United States, or by some officer having authority under the laws to grant permission to enter such limits” (3 Op. Atty. Gen. at 271). The

fact that a post office was located at the Academy made no difference since persons entering the post had no legal right to resort to it; except by permission of the commandant (*ibid.*). Similarly, the Superintendent may "prevent any person, or class of persons, not connected with the academy, from residing at or resorting to [the wharf or hotel], if, in the judgment of the superintendent, such a measure is required by the true interest of the service" (*ibid.*). As to persons actually living in houses on the post, the Attorney General said that the Superintendent "has a general authority to prevent any person within [the base] limits from interrupting its discipline, or obstructing in any way the performance of the duties assigned by law to the officers and cadets. * * * In the exercise of a sound discretion, the commandant of the post may, therefore, order from it any person not attached to it by law,"²⁰ whose presence is, in his judgment, "injurious to the interests of the academy" (*id.* at 272). The only suggested limitation on this power is when the resident civilian has a lease which is not revocable at the will of the United States.²¹ And even as to this situation, the Attorney General stated (*id.* at 273):

But although the power of the military commandant to remove a person guilty of miscon-

²⁰ The opinion said that the postmaster was such a person as his commission entitled him to remain until removed by the Postmaster General (3 Op. Atty. Gen. at 272).

²¹ By the end of the nineteenth century, however, it became firmly established that such an irrevocable lease of property on a military base was invalid without specific congressional authorization (see *infra*, pp. 45-49).

duct from the possession of a building may thus be modified by his official character [*i.e.*, the postmaster], or by the nature of the tenancy, I think there can be no doubt of his authority to exclude such person, in the mean time, from access to any part of the post not essential to the use of the building he may occupy, and to his ingress and egress to and from it. His general powers, were they not modified by circumstances, would enable him to remove the party altogether * * *.

Attorney General Butler's views of the broad discretionary power of a military commander were formally repeated by the Attorney General in 1906: "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand" (26 Op. Atty. Gen. 91, 92). They have also been reiterated again and again by Judge Advocates General of the Army. General G. Norman Lieber, in an opinion on October 15, 1896 (see Dig. Op. J.A. Gen. (1912), p. 267),²² expressly concurred in the view of the Department commander:²³

There is no doubt that a post commander exercising authority over a reservation (there

²² A copy of the full opinion of the Judge Advocate General, like the other such opinions cited in this brief, is temporarily in the possession of the Department of Justice. They were obtained either from the National Archives or from the Army Judge Advocate General's Office. The dates given, generally in parentheses, are those of the opinion.

²³ General Lieber stated in another opinion (July 5, 1899; see Dig. Op. J.A. Gen. (1912), p. 267): "The Post Commander has authority to exclude objectionable characters from the reservation * * *."

being no superior authority present) can in his discretion exclude all persons other than those belonging to his post from post and reservation grounds, but should he admit every body with the exception of one individual against whom no charge of wrongdoing existed," it would be considered an abuse of discretion and the party proscribed would have good grounds for complaint."

In 1902, Colonel George B. Davis, then Judge Advocate General of the Army," issued an opinion which made clear—contrary to some suggestions in Attorney General Butler's 1837 opinion—that persons *living* on military bases had no vested right to remain (July 16, 1902; see Dig. Op. J.A. Gen. (1912), p. 267): "As residents upon a military reservation are a sort of tenants upon sufferance and may be removed in the discretion of the post commander, a [liquor] license to such persons [issued by the United States District Court for Alaska] would be held subject to such power of removal * * *." A new case arose in 1902 involving the power of the Superintendent of West Point to exclude persons from the Academy. Colonel Davis stated that "[i]t is well settled that a post commander can, in his discretion, exclude all per-

²² This indicates that there is a stricter substantive standard for exclusion (that is, indication of actual wrongdoing) when a base is generally open to the public.

²³ The opinion makes clear that such complaint as to an abuse of discretion is to a higher military authority. In the very case which finally resulted in the Judge Advocate General's opinion, denial of access to the base was appealed to the Department commander.

²⁴ He was also the author of *Military Law* (1st ed., 1898).

sons other than those belonging to his post from post and reservation grounds" (May 6, 1904; see Dig. Op. J.A. Gen. (1912), p. 267). This statement was used to justify the exclusion of a particular retired military officer from a base. The opinion makes clear that no trial-type hearing was held into the officer's alleged misconduct for it says that the Superintendent is responsible only to his military superiors and that an investigation of the alleged misconduct should be conducted, but only to ascertain whether the retired officer should also be court-martialed. That same year, Colonel Davis stated in an opinion that "a post commander * * * may remove persons who offend against such police regulations as he may have established with a view to carry out the purposes for which the post was established" and may forbid such persons to return (October 8, 1904; see Dig. Op. J.A. Gen. (1912), p. 267).

Colonel Davis said in an opinion on April 18, 1907 that (see Dig. Op. J.A. Gen. (1912), p. 267):

It has long been held that it is within the authority of a post commander to eject any person from a military reservation whose presence or conduct is prejudicial to the public interest * * *; he may equally prevent an objectionable person from entering the military reservation. In both cases the act constitutes an exercise of legal discretion, and it should be based on substantial conditions of fact.

Two years later, Colonel Davis approved the exclusion of liquor dealers by the commanding officer of an Army base (April 6, 1909; see Dig. Op. J.A. Gen. (1912), p. 267). He quoted at length the "exhaus-

tive" opinion of Attorney General Butler and said: "I therefore concur in the views above set forth in respect to police control over military reservations in which the practice of the [War] Department for nearly a century is indicated." Colonel Davis also upheld the order of a post commander that a soldier's wife be removed from a base (July 14, 1909; see Dig. Op. J.A. Gen. (1912), p. 267). In an accompanying letter, he quoted from Attorney General Butler that the commandant of a post has the discretionary power to "order from it any person not attached to it by law, whose presence is, in his judgment, injurious to the interests of the academy." And in 1911 Judge Advocate General Enoch H. Crowder quoted the opinion of Attorney General Butler and said (September 15, 1911; see Dig. Op. J.A. Gen. (1912), p. 267):

This opinion has been frequently cited and held to establish the law as authorizing the commanding officer of a military reservation to exclude therefrom such persons, not having a lawful right to enter, as may be undesirable.

The enactment of Section 45 of the Criminal Code [now 18 U.S.C. 1382; see Appendix, *infra*, p. 92] has placed the question on a more satisfactory basis, and today there can be no question that it lies within the discretion of a commanding officer to forbid the reentrance of an individual upon a military reservation. While this authority is one closely related to the duty of the commanding officer to maintain order

²⁷ The Digest incorrectly dates the opinion September 16, 1911.

and discipline over the reservation which he commands, it is probable that, as in most other military questions, higher authority may also have a discretionary power to overrule the act of the subordinate. Such power should be exercised, however, with the greatest possible care since it is the subordinate who is directly responsible for the condition of the reservation and post.

General Crowder found no reason to interfere with the decision of a post commander to prevent a saloon keeper from entering the post to board or leave street cars or to use the railway station, privileges apparently allowed the general public.

In addition to the numerous opinions of the Judge Advocates General directly concerning the power of post commanders to exclude undesirable persons, it has long been well established that the Army and Navy have no power to grant irrevocable rights to use property on military bases. Irrevocable rights can only be granted if Congress passes a statute with specific authorization. This limitation on the powers of the executive rests, in large part, on the ground that military property cannot be committed to uses which may become incompatible with their military function. As applied to this case, the executive has no power to grant a right to enter and work on a military base which is not revocable whenever the executive believes this right is incompatible with the military function of the base.

In 1878 Attorney General Devens held that the Secretary of the Navy had no authority to allow a city

to construct a sewer on the grounds of a naval hospital (16 Op. Atty. Gen. 152):

[H]e has not the authority * * * to grant permission to make such an extension so as to confer any legal title or right upon the city of Chelsea * * *. A mere license for the use of the grounds may be granted by him; but this, from its very nature, is revocable at all times either by himself, his successors, or any other officer of the United States having lawful charge of the property. In order that a legal right should be given to the city of Chelsea to construct and maintain its sewer through the Government grounds, an act of Congress would be necessary.

Attorney General Miller decided in 1890 that the Secretary of War had the authority to grant a license for the construction of an irrigating ditch in a military reservation but only if it was "revocable at the will and pleasure of the Secretary of War" (19 Op. Atty. Gen. 628, 629). See also 20 Op. Atty. Gen. 93, 97 (1891). In 1897 Attorney General McKenna stated with regard to the construction of a Roman Catholic chapel at West Point (21 Op. Atty. Gen. 537, 541):

That these licenses transcend the statute [of July 28, 1892; see *infra*, p. 49] is plain. The statute provides for a definite term, with a power of even revoking that. The licenses provide for no term, and really commit the Government to a practical perpetuity. It would be idle to deny this—idle to deny that you do not expect to exercise * * * the power of revocation except in emergency. * * *

The license should therefore be revoked and the petitioner remitted to Congress.

That same year, on the authority of the earlier opinion, Mr. McKenna determined that the Secretary of War could not license construction of a bethel on a naval base and that the applicant must also seek his license from Congress (21 Op. Atty. Gen. 565). And in 1898, Attorney General Griggs held that, while a railway track could be laid on a government reservation, it does not convey "a substantially permanent right to maintain a railroad" (22 Op. Atty. Gen. 240, 246). The opinion further stated (*id.* at 245):

The right of an Executive Department of the Government to grant permission for the use of any part of the Government lands, except for Government purposes, has been several times considered by the Attorney-General. * * * In no instance that I know of has any Department assumed to grant anything more than a mere revocable license, subject to termination at any time at the will of the Government. That such license conferred no contractual right upon the licensee has been universally asserted by every Attorney-General who has had occasion to pass upon such concessions.

The Army Judge Advocates General have given numerous similar opinions. As Judge Advocate General Lieber described the legal situation (JAGO, C-2961):

It is on the face of it impossible for Congress to provide by legislation for every case which may arise, because unforeseen necessities for permissions of various kinds * * * spring up, and these can only be met by an exercise of the power of the Executive. These permissions are not always granted by formal written licenses. They may not be reduced to writing at all, but

be entirely informal, oral permissions, to do acts which without them would constitute trespass. These are in effect and substance revocable licenses, just as much as those expressed in a written instrument. * * * Whether it be to enjoy some continuous privilege or to do a single act, makes no difference. All are in effect revocable licenses, emanating from the same authority. And the only advantage of the revocable license by written instrument is that it is the most convenient evidence of the permission. * * *

The power of the President probably does not extend to the granting of licenses for the doing of anything which would be an injury to the property, nor can he grant other than revocable permissions * * *. He can not grant licenses that are not revocable, so that if it be for the erection of a building, * * * the license must be revocable.

Similarly, a few years later, Judge Advocate General Davis stated (June 11, 1901): "In the absence of authority from Congress, the Secretary of War can have no authority to grant any usufructuary or other *interest* in lands of the United States; but a license is a bare authority to do a certain act or series of acts upon the land of the licensor without possessing or acquiring any estate therein." These principles have been applied by the Judge Advocate General in numerous cases, including denial of an application to build a bridge, one end of which was on a military reservation, since the application was not for a license revocable by the government at will but for a permanent right of property; denial of an application to establish a ferry across a river in a military reservation

when the application was not for a license revocable at will but for a permanent franchise; denial of an exclusive right to mine within a military reservation for a certain term of years; denial of a right for an indefinite period to use a portion of a military reservation for irrigation ditches; denial of a right permanently or indefinitely to use part of a military reservation as a burying ground; authorization of a telegraph company to erect posts on a military reservation if they were revocable at the will of the government when found to interfere with the purposes for which the reservation was established; authorization of laying pipes within an arsenal's grounds which were subject to removal at the will of the government; and authorization of a civilian to reside and do business on a military reservation under a revocable license. Winthrop, *Digest of Opinions of the Judge Advocates General of the Army* (1895), pp. 477-478, 625-626.²² See also Dig. Op. J.A. Gen. (1912), p. 952.

The power of the executive to grant only revocable rights to use part of military bases is also reflected in proceedings in Congress. Congress passed the Act of July 28, 1892, 27 Stat. 321, allowing the Secretary of War to lease property, which he then had no power to lease, "for a period not exceeding five years and revocable at any time * * *." Congressman Outhwaite, the spokesman for the bill in the House, ex-

²² On the basis of these opinions of the Judge Advocate General, Colonel Winthrop concluded (p. 624) that, "without authority from Congress * * * an executive department or officer [cannot] convey away any *usufructuary interest* in land of the United States" (emphasis in original).

plained that the leases would be "revocable within [five years] if there is a change of administration, or if, for good reason, the Secretary [of War] thinks they should be revoked" (23 Cong. Rec. 6535). Over the last fifty years Congress has enacted several similar statutes allowing the executive to make revocable leases with regard to portions of military reservations. The Act of August 5, 1947, 61 Stat. 774 (10 U.S.C. (1952 ed.) 1270) authorized the lease of military property not now required for public use for a period of five years unless a longer period would promote the national defense or be in the public interest. The power to revoke at will must be retained unless it is determined that omission of the provision would benefit the national defense or public interest and, in any event, the power to revoke in a national emergency must be retained. Congress has also provided that the executive may, by revocable licenses, permit the American Red Cross to build buildings on military reservations for storage of supplies in case of a serious national disaster (Act of June 4, 1920, 41 Stat. 785; 10 U.S.C. (1952 ed.) 1347), permit the Young Men's Christian Association to erect buildings on military reservations (Act of May 31, 1902, 32 Stat. 282; 10 U.S.C. (1952 ed.) 1346), and allow National Guard units of the states to use military installations (Act of June 3, 1916, 39 Stat. 166 (32 U.S.C. (1952 ed.) 1, *et seq.*)). The Army Regulations currently provide that "[t]he Secretary of the Army may, by revocable license terminable at his discretion as the public interest may require, permit the use of real estate belonging to the United States which is under his control, provided

the * * * license conveys no interest therein * * *

(AR 405-80, para. 5c(1)(a) (July 29, 1955)). The Regulations also give post commanders power "to grant revocable licenses and revoke such licenses" for bus and taxicab service on installations (AR 405-80, para. 6b(3)(a)) and to grant revocable licenses to military and civilian personnel to occupy quarters on the base and to revoke such leases because of, *inter alia*, military necessity (AR 405-80, para. 6b(3)(i)).

Numerous more recent statements of the Army Judge Advocate General's Office reconfirm the longstanding power of commanding officers to control access to military bases at their discretion. That Office again decided (see *supra*, p. 44) that what is now 18 U.S.C. 1382 contemplates the power of commanding officers to exclude improper persons from their commands" (JAG 680.44, December 27, 1924). Shortly thereafter, in upholding the power of a post commander to require a license for salesmen desiring to work on the post, it was said: "It is well settled that a post commander can, under the authority conferred on him by statutes and regulations," in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline" (JAG 680.44, October 6, 1925;

" 5 U.S.C. 1382 admittedly does not, however, in itself grant this authority (see JAGA 1956/8970, December 27, 1956).

" The current Army Regulations (December 10, 1958) likewise state that "[t]he installation commander will establish appropriate rules governing the entry of persons upon and exit from the installation" (AR 210-10, para. 14).

see Dig. Op. J.A. Gen. (1912-1940), p. 925). The Judge Advocate General's Office has also stated (SPJGR 1944/3086 and 3129, March 23, 1944):

Post commanders are charged with the safety and defense of their posts, and the proper administration thereof, and in connection therewith they have a discretionary authority with respect to the admission or exclusion of individuals other than personnel of the posts. This authority is subject to the limitation that it may not be arbitrarily exercised, but normally the post commander is the judge as to whether the exclusion or admission of persons is consistent with the proper administration of an Army post.

And, again, it has been said (JAGA 1956/8970, December 27, 1956):

The authority of a commanding officer to restrict the entry of civilians upon an Army post arises from the responsibility imposed on him to safeguard the interest of the Government and the welfare of military personnel on the post. The manner in which such authority is exercised to promote good order and military discipline is within the discretion of the commanding officer concerned, subject to the limitation that it may not be exercised arbitrarily.

Accord, SPJGA 1944/6071, June 16, 1944.

These principles have been followed by the Judge Advocate General's Office in upholding a prohibition of all forms of door-to-door solicitation which was applied to representatives of the Watchtower Bible and Tract Society (the representative of the Society was summarily stopped by guards) (CSJAGA 1950/1924,

April 14, 1950); upholding the right of a commanding officer to allow local census takers on the post or to exclude them "in his discretion" (JAGA 1955/4865, May 13, 1955); determining that securities salesmen may be permitted on the military base "at the discretion of the installation commander"³¹ (JAGA 1955/7420, September 20, 1955); stating that, in some instances, the commanding officer may find it "necessary and proper to exclude Federal" officials enforcing the Migratory Bird Treaty Act (JAGA 1954/2907, March 24, 1954; see 4 Dig. Op. J.A. Gen. 484); upholding the exclusion of charity solicitors believed to be engaged in sharp practices (no hearing indicated) (JAGA 1954/3606, April 6, 1954); deciding that a commanding officer can grant or deny "in his discretion" permission for a person to enter a military reservation in order to discover a treasure trove (JAGA 1955/4601, May 9, 1955); upholding the exclusion of life insurance agents or entire companies from a single Army base or all Army installations because of violations of Army regulations in that field (without a formal hearing)³² (see, *e.g.*, JAGA 1957/7457, September 20,

³¹ Army Regulations 210-10 (December 10, 1958), para. 51, states that "[s]olicitation on installations may be permitted at the discretion of the commander * * *."

³² The Regulations provide for the withdrawal of the right to solicit only after a complete investigation (AR 600-101, para. 7a (January 30, 1958)). In addition, before an agent has his solicitation privilege withdrawn or suspended he must "be afforded an opportunity to be heard" (*id.*, para. 7b(2)). It is clear, however, that the Regulations do not contemplate a trial-type hearing since the evidence against the agent generally takes the form of affidavits and the opportunity to be heard generally means the opportunity to submit a written brief or an oral ex-

1957; JAGA 1955/10067, December 1, 1955; JAGA 1955/6864, August 15, 1955; JAGA 1955/5100, May 27, 1955; JAGA 1957/8507, October 30, 1957; JAGA 1957/7109, September 3, 1957; JAGA 1956/9099, December 26, 1956; JAGA 1956/7032, September 18, 1956; JAGA 1955/4052, April 20, 1955 (see 5 Dig. Op. J.A. Gen. 471); JAGA 1955/4910, May 19, 1955; JAGA 1957/5508, June 21, 1957; JAGA 1957/9309, December 13, 1957; JAGA 1957/6247, August 1, 1957; JAGA 1957/5738, June 28, 1957; JAGA 1955/4105, May 2, 1955).

In sum, it is clear that throughout our history commanding officers have controlled access to military bases summarily, and that any arbitrary use of their power has been appealable only to, and reviewable by, superior military or executive authority. Indeed, it is well established that a person cannot be given by the executive any right to use a military base which is not revocable at the discretion of the executive. Accordingly, civilian employees cannot be given, without authorization by Congress, a right to work on a

planation. There is no comparable "opportunity to be heard" requirement before action can be taken against companies but they are also generally offered an opportunity to explain. Exclusion of agents or companies from all Army posts is determined by Headquarters, Department of the Army (*id.*, para. 7c, d)—an installation commander can exclude only from his own post.

The Regulations as to automobile insurance salesmen provide for withdrawal by the post commander of the privilege of solicitation for violation of the Regulations or for engaging in other practices "detrimental to the best interests of military personnel." These Regulations also give "[t]he agent concerned * * * the opportunity to be heard" (AR 608-10, para. 6e (October 22, 1957)).

military base which is not revocable at the will of the executive. Thus, contrary to petitioners' contention, the burden is on petitioners to show that Congress has authorized or required the executive to surrender its inherent power to revoke at will any license to enter military bases; the burden is not on the executive to show specific authorization for the power to revoke Mrs. Brawner's badge. If, as petitioners maintain, Congress has not acted, Mrs. Brawner's right to enter the Gun Factory for employment purposes is revocable at the discretion of the executive, just as it has been for well over a hundred years.

The underlying reason for the historic plenary power of commanders over access to military bases is the vital need to maintain command authority and, therefore, responsibility (see Opinion of Judge Advocate General Crowder, *supra*, pp. 44-45). As the regulations and manuals relied on above demonstrate (pp. 26-27, 28), military officers are given "absolute" authority and responsibility for their base commands in general and for the security of these commands in particular—to the extent that base commanders have discretion to exclude persons from their installations even when the visit has been approved by higher military authority (see *supra*, p. 28). To require notice and hearings, whether before or after a person has been excluded from the base, would clearly and seriously interfere with command authority and responsibility which depends on quick and conclusive action by military commanders.

3. *The contract.*—Petitioners claim (Pet. Br. 65-66) that the security provisions in the contract between

the Concessionaire and the Gun Factory—that the Concessionaire cannot employ persons not meeting the security requirements of the base—cannot confer independent authority on the government to deny Mrs. Brawner access to the base. But the government does not claim that the agreement gave it such authority for the action taken. Rather, the contract is merely a manifestation and recognition of the lawful authority of the Superintendent of the Gun Factory given by the regulations and manuals. It was neither erroneous nor surprising that this provision was cited as the basis for withdrawing petitioner Brawner's badge by respondents in dealing with the Concessionaire and its employees (see R. 32-33, 59-60, 63, 68-69), instead of the authority given to the Superintendent of the Gun Factory which underlay the agreement.

Petitioners argue that the agreement may not be relied upon because it is in conflict with the National Labor Relations Act—that is, the Concessionaire violated its duty under Section 9(a) of the Act (29 U.S.C. 159(a)) to bargain exclusively with petitioner Union as to conditions of employment by including the security provision in its agreement with the Gun Factory (Pet. Br. 67-68)—and because petitioner Union had no knowledge of this provision (Pet. Br. 68, note 41). As we have said, the validity of the contract as against the petitioners is irrelevant in deciding whether the government had lawful authority to act. In any event, the agreement merely reflects the lawful authority of the government to keep persons not meeting security requirements from the base and therefore incidentally from their place of employ-

ment. Certainly, the National Labor Relations Act was not intended to limit the long-standing authority of military officers to control access to their commands."

The fact that petitioner Union had no knowledge of the security provision in the contract between the Concessionaire and Gun Factory is immaterial. The Union's function was limited to representing its members in collective bargaining with the Concessionaire regarding wages, hours, and working conditions. The security requirements of the Naval Gun Factory are clearly not proper subjects of collective bargaining between the Concessionaire and the Union."

II

THE INTEREST OF A PRIVATE PERSON IN HAVING ACCESS TO A MILITARY BASE IN ORDER TO BE ABLE TO WORK THERE FOR A PRIVATE EMPLOYER IS NOT "LIBERTY" OR "PROPERTY" ENTITLED TO PROCEDURAL DUE PROCESS PROTECTIONS

Petitioners contend (Pet. Br. 77-84) that Mrs. Brawner was denied due process of law by the summary action of respondents causing her "to lose her job, to impair her employment opportunities, and to besmirch her reputation" (Pet. Br. 77). But Mrs.

³³ It is also significant that Section 2 of the National Labor Relations Act (29 U.S.C. 152) states that the term "employer" shall "not include the United States or any wholly owned Government corporation." While here the federal government was not the employer, this statutory provision strongly suggests that the Act was not intended to concern action by the federal government in its capacity as the owner of property.

³⁴ The Union could have obtained a copy of the agreement by asking either the Concessionaire or the Gun Factory for it.

Browner did not in fact lose her job with the Concessionaire and her employment opportunities have not been impaired as much as she claims (see *supra*, pp. 20-22). Instead, her employer, in effect, transferred her to another position because she no longer had the qualifications to work at the Gun Factory. She had no constitutional right to have a hearing before such a transfer could be made. As the court of appeals stated (R. 159):

* * * [B]y way of analogy, certainly no one would doubt the authority of the Supreme Court to require its private printer to transfer a Linotype operator who, without wrongful intent, portrayed to his friends at afternoon stops in a convenient bar the nature of the opinions he was putting in print. No one would contend, we think, that the right of a Linotype operator to work on the advance printing of opinions of the Court is such that he could not be removed from the premises without a hearing in full panoply of charges, confrontation of witnesses, compulsory disclosures in public by his cronies, cross-examination, and findings. An investigation sufficient to satisfy the Court of the afternoon garrulity of the employee and a quiet word to the printer would be all such a situation would entail, we think. He could be put to work somewhere else.

See also the concurring opinions of Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 181, and *Peters v. Hobby*, 349 U.S. 331, 352, discussed *supra*, p. 21, note 10.

Petitioners' due process argument must therefore depend on the injury to Mrs. Browner's reputation by

having her badge withdrawn as a "security risk." As we will show (pp. 33-88), this injury to reputation is not in itself entitled to constitutional protection. First, however, we will contend (pp. 61-83) that, even if Mrs. Brawner had in fact lost her job and her employment opportunities, she was denied no rights which are protected under the Fifth Amendment."

It may be helpful to say explicitly, at the outset of this constitutional discussion, that we do not think these issues can be fruitfully discussed in terms of petitioner's "standing," for the action taken in this case clearly affects sufficient interests to enable petitioners to assert whatever rights they may have. Cf. *Greene v. McElroy, supra*, 360 U.S. at 493, note 22. The question is essentially one going to the merits and turns on whether petitioner Brawner has any "rights" which traditionally have been, or ought to be, accorded judicial protection. In its primary form, the issue is

³⁵ Petitioners also claim (Pet. Br. 84-86) that Mrs. Brawner's rights under the First Amendment were violated, but this contention is plainly without substance. Certainly, the naval commander here could have withdrawn her badge for security reasons after a full trial-type hearing even though freedom of speech, the press, and association might to some extent be indirectly affected. This could result since persons can without doubt be excluded from military installations on the basis of speech or action which may be within the general area of the First Amendment, but which raises a suspicion that the person is or could easily become a security risk, or even merely produces a lack of confidence in the person. Since the inherent effect on First Amendment rights is substantially the same whether or not trial-type procedures are afforded, the only real issue is whether such procedures are required by the due process clause of the Fifth Amendment.

whether her interest in access to the Naval Gun Factory amounts to "liberty" or "property" of which she cannot be deprived without procedural due process of law. It is not enough that Mrs. Brawner has been seriously hurt by the action taken, for it is not true, as suggested, that procedural due process is required whenever substantial interests are affected by governmental action. Every day there are substantial interests affected in one way or another by legislative or administrative action which cannot call upon the procedural protections of the Fifth or Fourteenth Amendments." For constitutional protection to be afforded, some "liberty" or "property" must first be deprived. These are, of course, not terms of immutable content; but they are limitations on the scope of the due process clause and require distinctions, not only on the basis of the substantiality and directness of the impact of government activities, but also on the basis of the "nature" of the interests affected. They afford the dividing line between those interests which are judicially protected against governmental interference and those for protection of which reliance must be placed upon the other branches of government.

* For example, selection of contractors; fixing the terms and conditions upon which the government will contract; the determination of federal grants and aids; refusal to hire; refusal to make loans; changes in federal borrowing policies and procedures; changes in interest rates or central-bank practices; decisions by the Department of Justice to prosecute or not to prosecute, to bring a civil suit or not, to appeal an adverse judgment or not, to compromise a case or not, etc.

A. ACCESS TO A MILITARY BASE IS A PERMISSIVE USE OF PROPERTY AFFORDED BY THE GOVERNMENT SOLELY FOR ITS OWN CONVENIENCE; NO ANALOGOUS INTEREST HAS EVER BEEN RECOGNIZED AS LEGALLY PROTECTED

1. We will assume, *arguendo*, as petitioners allege (but see *supra*, pp. 21-23), that Mrs. Brawner has lost her employment and has been seriously hampered in obtaining other work by being denied access to the Gun Factory for "security reasons." The fact remains, however, that the subject matter of the government's action, and the only power asserted by it, was the refusal to allow her, a private person, to enter a military base, the protection of which was the responsibility of the government. Such access is made available to private persons solely for the convenience of the government—when necessary to have services performed—and not to confer benefits or advantages upon the recipient. If the recipient has any interest at all in entering the base, it can be described as only a "permissive use" for the primary convenience and benefit of the government. When, therefore, the government determines that it is no longer to its interest that a private person have access to the base, it is exercising its proprietary power over property committed to its custody, to terminate an arrangement, at sufferance, entered into for its own convenience and benefit."

The interest of petitioner Brawner affected by such action is not one that has traditionally been accorded judicial protection. See *supra*, pp. 37-55. Petitioners' attempt to analogize the action to an interference with

" This arrangement is reflected in the agreement between the Concessionaire and the Gun Factory (see *supra*, p. 3).

contractual relations (Pet. Br. 88-89) is unsupportable, for there can be no doubt that a private person would be legally free to take precisely the same action for the protection of his property and other interests. The effort here is not to subject the government to duties comparable to those of a private person but to subject it to greater duties because it is the government, and it is in that light that the question must be viewed. In reality, the issue is whether Mrs. Brawner's interest is one entitled to constitutional protections notwithstanding that it is not otherwise accorded recognition in our law.

2. The action of the government in this case—the withholding from Mrs. Brawner of the opportunity to enter a military base—is very different in nature from the exercise of a legislative power to affect the legal rights and duties of private persons at large. In licensing cases, for example, the administrative denial of a license derives its force from a statute making it illegal to engage in the activity without one. The effect of the administrative action is to impose a legal disability upon the person denied the license. The imposition of such a disability is true of all the cases involving private employment relied upon by petitioners to support their constitutional argument (Pet. Br. 81-84, 87-88): *Parker v. Lester*, 227 F. 2d 708 (C.A. 9), seamen and longshoremen were permanently barred from their occupation and employment by private shipowners unless cleared by the Coast Guard, whether or not government contracts or shipments were involved; *In re, Burke*, 87 Ariz. 336, 351 P. 2d 169, where admission to the bar was a prere-

quisite to the private practice of law; *Truax v. Raich*, 239 U.S. 33, where employment of aliens in excess of a prescribed number in one of the "common occupations of the community" was forbidden. See also *Schwabe v. Board of Examiners*, 353 U.S. 232, which likewise involved admission to the bar; *Cummings v. Missouri*, 4 Wall. 277, and *Ex parte Garland*, 4 Wall. 333, where adherents to the Confederacy were barred from religious teaching and the practice of law; and *Yick Wo v. Hopkins*, 118 U.S. 356, involving a state licensing practice found to be racially discriminatory.

It may be that in some situations—but not in that before the Court in this case (see *supra*, pp. 20–33)—the denial of entrance to a military base may have the same practical consequences as would a legal bar to his employment in an entire occupation or industry. But to say that for this reason the two actions must be subject to the same restrictions is to ignore the whole history of the development of legal rights and constitutional protections, in which the nature of the interest, and not simply the substantiality of the injury, has been of controlling importance. The difference in the nature of the powers asserted is crucial: in the one case, the government is asserting a legislative power to regulate (by creating legally-enforceable rights and duties) an industry or a class of persons at large and to control their dealings with one another; in the other case, it is exercising a power, no different in nature from that of any private person in respect to his own property, to control the use of its own property.

That distinction is deeply rooted in our law. It has, for example, been frequently asserted as the basis for denying the standing of government contractors to object to administrative action by which they are deprived of the award of contracts. In the leading case, *Perkins v. Lukens Steel Co.*, 310 U.S. 113, bidders sought to enjoin the inclusion in proposed contracts of provisions requiring them to pay the prevailing wage in the "locality" as determined by the Secretary of Labor, alleging that the Secretary's determination was in violation of the statute, would prevent them from competing with bidders in other areas, and would thus cause them irreparable injury. The Court, in an opinion by Mr. Justice Black, held that the bidders had no standing to challenge the legality of the Secretary's action:

We are of opinion that no legal rights of respondents were shown to have been invaded or threatened * * *. It is by now clear that neither damage nor loss of income in consequence of the action of Government, which is not an invasion of recognized legal rights, is in itself a source of legal rights in the absence of constitutional legislation recognizing it as such. * * *. [p. 125]

Like private individuals and businesses, the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases. * * * Judicial restraint of those who administer the Government's purchasing would constitute a break with settled judicial practice

and a departure into fields hitherto wisely and happily apportioned by the genius of our polity to the administration of another branch of Government. [pp. 127-28]

* * *

The Act does not represent an exercise by Congress of regulatory power over private business or employment. In this legislation Congress did no more than instruct its agents who were selected and granted final authority to fix the terms and conditions under which the Government will permit goods to be sold to it. * * *. [pp. 128-29]

* * *

The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation. On the contrary, respondents in effect seek through judicial action to interfere with the manner in which the Government may dispatch its own internal affairs. And in attempted support of the injunction granted they cite many cases involving contested Government regulation of the conduct of private business. Their cited cases, however, all relate to problems different from those inherent in the imposition of judicial restraint upon agents engaged in the purchase of the Government's own supplies. [pp. 129-30]

The practical effect of the Secretary's wage determination in that case upon a contractor dependent entirely upon government contracts would obviously be the same as a legal duty to pay the prescribed wage imposed by "an exercise by Congress of regulatory power over private business," and it requires no

citation of authority to show that in the latter event the contractor would have been entitled to challenge an allegedly illegal determination by the Secretary.

A similar case is *John & Sal's Automotive Service v. Sinclair Refining Co.*, 165 F. Supp. 518 (S.D. N.Y.). There, the State of New York contracted with Sinclair to provide emergency road service on its highways. The contract provided that Sinclair could subcontract for plaintiff to perform part of the job, subject to the continuing approval of the State. If the sublicensee's services proved to be unsatisfactory to the State, Sinclair could terminate by giving the sublessee twenty-four hours' written notice. The State notified Sinclair that the sublessee's service was unsatisfactory and Sinclair terminated the contract with its sublessee. In answer to the sublessee's claim against the failure of the State to notify the sublessee of the contemplated action and to provide a hearing on the issue whether its service was satisfactory, the district court held (*id.* at 522):

* * * In notifying Sinclair that plaintiff's service was not satisfactory the agencies did not adjudicate that question. They merely asserted their claim that the sublicense should be ended because of unsatisfactory service. This claim was in no sense a "quasi-judicial" determination of that proof. Nor was any order entered purporting to affect the rights of the plaintiff under its contract with Sinclair. The vital distinction between the situation at bar and the cases in which notice and hearing are required is that the agencies were not here exercising any governmental function. It is

the exercise of such a function that brings into play the "notice and hearing" requirement of the due process clause. Put another way, the agencies here were only exercising the right which their contract with Sinclair gave them: to declare their belief that plaintiff's service was unsatisfactory and to request that its sub-license be cancelled. "When a state becomes a party to a contract * * * the same rules of law are applied to her as to private persons under like circumstances." * * *

Not only do the *Lukens Steel* and similar cases demonstrate the essential difference between action by the government in its proprietary capacity and its action in a regulatory capacity—so far as individual rights, are concerned—but they also show that those dealing with the government in its former capacity ordinarily do not acquire any interest entitled to judicial protection. In turn, if the interest one has in obtaining and retaining government contracts—or, as in this case, in working for a company which has one—is not sufficiently significant for protection against action in violation of express statutory commands (as was alleged in *Lukens*), it is difficult to see how it can amount to "liberty" or "property" which, under the Fifth Amendment, can be taken from him only by a trial-type hearing.

3. It is true that the fact that an interest is not accorded judicial protection for other purposes does not necessarily mean that governmental action affecting it is entirely immune from constitutional restraints. For example, although no one has a "right" to government employment in any meaningful sense,

this Court has observed that "None would deny" that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office.'" *United Public Workers v. Mitchell*, 330 U.S. 75, 100. In *Wieman v. Updegraff*, 344 U.S. 183, 192, the Court held unconstitutional a denial of state employment on grounds of innocent membership in allegedly subversive organizations, stating: "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." Similarly, in *Slochower v. Board of Education*, 350 U.S. 551, automatic dismissal from state employment on the sole ground that the employee invoked the Fifth Amendment privilege against self-incrimination before a federal legislative committee was held to violate due process. That the *Slochower* decision was not based on any lack of procedural protection is made clear by *Lerner v. Casey*, 357 U.S. 468, where a city employee was discharged as a security risk for refusal to answer questions asked by his employer. *Slochower* was distinguished on the ground that the state could rationally conclude from the employee's refusal to answer that he was of doubtful trust and reliability, and therefore was a security risk. *Id.* at 476-478."

"The courts have, of course, held in numerous other situations that the executive has power to act summarily or (at least) without a trial-type hearing, even though particular persons are drastically affected. See, e.g., the government employee discharge cases, *infra*, pp. 73-74; cases involving access to and use of government property, *infra*, pp. 75-76; *Khauff v.*

From these and comparable cases, it follows that, although no one has a legal right to access to a military base, the government could not establish a policy of denying access to such bases solely on the basis of color or some other ground bearing no rational relationship to a legitimate governmental object." To assert, however, that it also follows that a trial-type hearing must be afforded in applying a proper substantive standard is to ignore an important and fundamental difference between "substantive" and "procedural" due process. We suggest that the true explanation of the *Public Workers—Wieman—Slochower* line of cases is an evolving doctrine that the Constitution itself creates an affirmative right, regardless of the nature of the interests affected or of the protection otherwise afforded them, not to be discriminated against by state or federal government on the basis of an invidious classification. The evil condemned is the discrimination itself, and it is not essential that the governmental action affect any other legally-rec-

Shaughnessy, 338 U.S. 537 (exclusion of aliens); *Ludecke v. Watkins*, 335 U.S. 160 (removal of enemy aliens); *Dakota Central Telephone Co. v. South Dakota*, 250 U.S. 163 (seizure of telephone lines); *Chicago & Southern Air Lines v. Waterman Corp.*, 333 U.S. 103 (denial of a certificate of convenience and necessity to operate a foreign air line route).

³⁹ There is no merit to petitioners' apparent suggestion (Pet. Br. 10-11) that there was no rational support for removal of Mrs. Brawner's badge, since this action was based on insignificant evidence of her connection with Communism. Since the reason for the action by the Gun Factory has never been disclosed, and does not appear on this record, it is impossible to determine on what information it was grounded. And there can be no doubt that access may be refused for the series of reasons comprised within the term "security reasons" (see *infra*, pp. 85-86).

ognized interest apart from the right to be free from discrimination. In its procedural requirements, on the other hand, the due process clause is necessarily a purely negative command; one does not have a "right" to have a fair hearing but only a right not to be deprived of certain kinds of interests *without* a fair hearing. Accordingly, an existing interest must be recognized independently of the due process clause before its procedural requirements become applicable.

Although the Court has not made this distinction explicit, it is one expressly made in the Fourteenth Amendment in the difference in wording between the equal protection clause and the due process clause: while the command of one is that no person shall be deprived of "life, liberty, or property, without due process of law," the command of the other is simply that no person shall be denied "the equal protection of the laws." The latter is absolute, while the former is in terms applicable only to a deprivation of life, liberty, or property. We suggest that, in the development of "substantive" due process, much of the concept of the equal protection clause has, in effect, been incorporated into the due process clause (cf. *Bolling v. Sharpe*, 347 U.S. 497) and it is primarily that concept—an invidious classification by the state in itself offends the Constitution regardless of the nature of the interests that are the subject matter of the action—that explains the Court's holdings that an arbitrary classification of persons excluded or expelled from public employment violates due process whether or not there is a "right" to public employment.

But while this interest protected by *substantive* due process springs, in some cases at least, from the Constitution itself (i.e., the interest in being free from invidious official discrimination), the interest sought to be protected by *procedural* due process must spring from other sources and have an existence independent of the interest in procedural due process. While freedom from discrimination on invidious grounds (e.g., color, religion, etc.) may be an end in itself, procedure is a means rather than an end. It does not exist *in vacuo*. Its function is to minimize possibilities of error or unfair evaluation *in dealing with some substantive interest*; and a substantive interest must therefore be recognized before procedural due process can be claimed. Accordingly, whatever may be the rule in substantive due process cases (at least as to certain kinds of discrimination), there remains the problem, whenever a right to procedural due process is claimed, of defining the nature of the substantive interests sought to qualify as "life, liberty, or property."

4. None of the cases cited by petitioners, therefore, supports their claims that Mrs. Brawner's interest in access to the Naval Gun Factory is one constitutionally protected against deprivation without procedures satisfying the standards of due process. The cases involving governmental regulation of private persons in their dealings with each other present, as we have seen, very different problems. The only cases involving analogous (though clearly distinguishable) interests are those dealing with government employment, and each of those involved only substantive, and

not procedural, due process questions. In *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, the only other case on which substantial reliance is made (Pet. Br. 78-81), the official action taken would admittedly have constituted defamation at common law and thus invaded a legally-recognized right. As we show below (pp. 83-88), the alleged injury to petitioner Brawner's reputation in this case cannot afford an independent basis for invoking constitutional protection if the action taken did not otherwise violate constitutional rights.

B. CONTROL OVER MILITARY BASES IS AN EXECUTIVE FUNCTION WHICH HAS NEVER BEEN, AND SHOULD NOT BE, SUBJECTED TO JUDICIAL REVIEW

1. For reasons implicit in the constitutional separation of powers, the courts have traditionally refused to intervene in the conduct by the government of its internal affairs. These are matters which have wisely been left to the discretion of the executive and to correction, if necessary, by political processes. As this Court long ago recognized, and has frequently repeated, "The interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and we are quite satisfied, that such a power was never intended to be given to them." *Decatur v. Paulding*, 14 Pet. 497, 516.* Underlying

* See also *Perkins v. Lukens Steel Co.*, *supra*, 310 U.S. at 131-132; *Adams v. Nagle*, 303 U.S. 532, 542; *United States ex rel. Girard Co. v. Helvering*, 301 U.S. 540, 543; *United States ex rel. Chicago-Gt. Western R.R. Co. v. I.C.C.*, 294 U.S. 50, 62; *Wilbur v. United States*, 281 U.S. 206, 218; *Work v. Rives*,

this judicial restraint is the conviction that with responsibility must also go power and that it is not on the courts alone that citizens must rely for protection: "legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts." *Missouri, K. & T. Ry. Co. v. May*, 194 U.S. 267, 270; *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 146; *United States v. Butler*, 297 U.S. 1, 87 (Mr. Justice Stone dissenting).

As we have noted (pp. 64-67), one such area in which the courts have been reluctant to interfere is the award of government contracts. Another is the power of removal of government employees. In cases challenging the validity of administrative dismissals of government employees, the courts have refused to go beyond a determination that any procedural or substantive rights granted by Congress have been complied with.⁴¹ That history was canvassed in detail in the opinion of the court of appeals in *Bailey v. Richardson*, 182 F. 2d 46 (C.A. D.C.), affirmed by an equally-divided Court, 341 U.S. 918, upholding the constitutionality of the dismissal of government employees on loyalty grounds without confrontation of witnesses, and need not be repeated here. It is sufficient to say, as the court of appeals there concluded, that "Never in our history has a Government

267 U.S. 175, 183; *Hall v. Payne*, 254 U.S. 343, 347; *Litchfield v. The Register and Receiver*, 9 Wall. 575, 577; *Gaines v. Thompson*, 7 Wall. 347.

⁴¹ Subject, of course, to the requirement that the statutory grounds for dismissal may not be patently arbitrary or discriminatory. See the discussion of the *Wieman* and *Slochower* cases, *supra*, pp. 68-71.

administrative employee been entitled to a hearing of the quasi-judicial type upon his dismissal from Government service" (180 F. 2d at 57), and that no court has ever held such process to be required. While it might be suggested that loyalty or security programs introduce a new problem in this area, it may be doubted that there is a constitutional distinction between the injury to persons dismissed on such grounds and, for example, the injury suffered by one dismissed, without criminal conviction, for accepting bribes (*Eberlein v. United States*, 257 U.S. 82), theft (*Kent v. United States*, 105 C. Cls. 280), or attempted seduction by force (*Golding v. United States*, 78 C. Cls. 682, certiorari denied, 292 U.S. 643). In those cases, too, the courts have refused to find interests of sufficient character to be protected by procedural due process. And in *Vitarelli v. Seaton*, 359 U.S. 535, 539, this Court stated that a government employee not protected by statute or regulation could be summarily discharged "at any time without the giving of any reason."⁴³

⁴³ The court of appeals similarly said below (R. 158):

Except for special classes, Government employees may be removed summarily without charges and, except for the provisions of the Lloyd-La Follette Act, without reasons. A holding to the contrary would necessitate a ruling that the Lloyd-LaFollette Act is and always has been invalid; that the hundreds of employees discharged under its procedural terms since 1912 were wrongfully discharged; and that Government employment at all levels carries life tenure, i.e., inherent, constitutionally protected invulnerability to discharge, except upon charges, open hearings, confrontation by witnesses, cross-examination, and findings. Such conclusions have no support in law, in our opinion.

2. The summary power of the executive to control persons desiring to come on or use government property—particularly military property—is even more clear. Article IV, Section 3, Clause 2, of the Constitution gives Congress the power to control and dispose of the property of the United States. "The power over the public land thus entrusted to Congress is without limitations." *United States v. San Francisco*, 310 U.S. 16, 29. Congress may delegate to the Executive the authority to make rules and regulations respecting the conditions under which persons will be allowed to enter and use public land. *United States v. Grimaud*, 220 U.S. 506. Whether exercised by Congress or the executive, the government has absolute control over property of the United States and under this power may exclude persons who have been using such property, even when this exclusion causes pecuniary damage. See, e.g., *Utah Power & Light Co. v. United States*, 243 U.S. 389; *United States v. Midwest Oil Co.*, 236 U.S. 459; *Light v. United States*, 220 U.S. 523; *Camfield v. United States*, 167 U.S. 518. Moreover, when the government chooses to admit some persons upon its property, it can properly condition this privilege. "The right to absolutely exclude all right to use, necessarily includes the authority to determine under what circumstances such use may be availed of * * *." *Davis v. Massachusetts*, 167 U.S. 43, 48. Similarly, in *Packard v. Banton*, 264 U.S. 140, 145, the Court stated: " * * [A] distinction must be observed between the regulation of an activity which may be engaged in as a matter of right and one carried on by government

sufferance or permission. In the latter case the power to exclude altogether generally includes the lesser power to condition and may justify a degree of regulation not admissible in the former." Thus, there can be little doubt that the executive has the constitutional power to base admission to government property on conditions, and to exclude persons from this property whenever it believes their presence is inconsistent with the use of the property. No judicial decision has ever suggested that this power can be exercised only on the basis of an adjudication after a hearing."

"Petitioners claim (Pet. Br. 98) that, if the government has power to control access to its property summarily, this power would have been conclusive in the recent government employee cases such as *Cole v. Young*, 351 U.S. 536 and *Peters v. Hobby*, 349 U.S. 331. However, this power to exclude summarily cannot be used to deprive government employees of whatever rights they may possess under the Constitution, statutes, or regulations. The incidental question of access to government property cannot be used in such a situation to swallow up the basic question of the right to employment. In this case, however, Mrs. Brawner, being the employee of a private company, has no rights *vis-à-vis* the government except her claim of right to access to government property.

Petitioners cite (Pet. Br. 102-103) *Tucker v. Texas*, 326 U.S. 517, and *Marsh v. Alabama*, 326 U.S. 501, which held unconstitutional attempts to prohibit the distribution of religious literature in towns owned by the federal government and a private corporation, respectively. It is clear, however, that the basis of these decisions was that both towns were open to the public: "The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it" (*id.* at 506). Certainly, persons have no constitutional right to enter government property, and especially a military base, which is closed to the public, whenever they wish to distribute religious literature.

What is true of the executive's power to make contracts, to dismiss government employees, and to decide who may come on or use ordinary government property is true with redoubled force of the power to say which private persons may have access to military bases—for here we are dealing with the most vital interests of the nation. In no area is the constitutional responsibility of the executive branch any greater or clearer; if there are to remain any powers of the executive free of judicial supervision, they must include the ultimate and absolute control of military installations for which the executive has responsibility. And in no area is the history of summary action by the executive more clear than as to access to military bases (see *supra*, pp. 37-55). This history, which has not even been judicially challenged until this litigation, shows that the due process clause of the Fifth Amendment has never been regarded as conveying any procedural rights, vindicable in the courts, to persons seeking to enter military bases.

Of course, due process is not a static concept and pages of history, for all their significance, do not necessarily control in the face of new circumstances and new problems. But the assertion that the problems presented by modern day security programs are essentially different in nature from the age-old problems of internal administration of the government cannot be accepted without qualification. While the expansion of military activities means that larger numbers of people are affected, it is doubtful whether the number of persons affected today by the military's control over access to its installations is proportionately

higher than in the nineteenth century. And it does not seem particularly relevant to the scope of the constitutional protections that many persons, rather than a few, may suffer the same kind of injury; the rights, like the injuries, are individual. In any event, the great expansion in the responsibilities of the government and the increased dangers to our society give added significance to the need for broad discretion and flexibility in determining how these responsibilities should be carried out. In short, we find no substantial reason—and petitioners suggest none—for suddenly creating at this time a right to enter military bases within the protection of the due process clause.

3. The lack of a constitutionally protected interest in access to a military base for purposes of private employment is graphically shown, we believe, by the circumstances of this case. First, as we have indicated (see *supra*, pp. 21–22), petitioner Brawner was not deprived of her employment nor of future employment opportunities, but only of a job at one of the two locations at which her employer was operating. Second, whatever interest Mrs. Brawner had in her particular job, it was obviously contingent on the government's not taking summary action (other than removal of her badge) which it clearly had a right to take. Certainly, the Navy could summarily close the Gun Factory entirely; summarily cancel its contract with the Concessionaire before the expiration date (the only possible remedy would run in favor of the Concessionaire); or summarily decide, upon expiration of the then existing contract, that no new concessionaire would be permitted to operate at the Gun

Factory. Any of these possibilities would mean that Mrs. Brawner would lose her job at the Gun Factory and, if the Concessionaire were not able to employ her at another location, that she would lose her employment and seniority rights as well. In addition, Mrs. Brawner's continued access to the Gun Factory, and thereby to her work, was conditional upon her meeting the Factory's security requirements.

As it happened, the failure of the last condition happened first, although subsequently the Concessionaire lost its contract and the Navy drastically reduced operations at the Gun Factory (see *supra*, pp. 7, 20 at note 9). Thus, even if Mrs. Brawner's badge had not been withdrawn; her job would have soon been in danger. While she has been offered a job with the new concessionaire, this is new employment with a different employer, even if the character of her work happens to remain the same. And it is possible that this new job may not exist much longer after the cafeteria operations at the Gun Factory are reduced proportionately with the reduction of other employment at that installation (see *supra*, p. 20, note 9).

Mrs. Brawner's claimed right to employment actually exists only *vis-à-vis* her employer, the Concessionaire. Yet, throughout their argument, petitioners confuse Mrs. Brawner's status with respect to the Gun Factory with her status with respect to her employer, M & M, an entirely different entity. Mrs. Brawner may have acquired certain rights against her employer by virtue of the collective bargaining agreement in force, such as those involving job security, seniority, sick leave, annual leave, re-

tirement benefits, promotions, etc. The Gun Factory was neither a party to this agreement, nor subject to its terms. To say that Mrs. Brawner could exert the rights acquired from the Concessionaire under the collective bargaining agreement against the Gun Factory is to make the Gun Factory a subordinate adjunct of the Concessionaire. On the contrary, the power of the government over security at the Gun Factory is completely independent. As part of his power over the government property on which the agreement was to be carried out, the commanding officer could effect modification of the collective bargaining agreement to the extent that security requirements of the Gun Factory demanded.

4. It does not appear to be questioned in this case that the final responsibility to determine which private persons may enter a military base must lie in the executive; that the executive may ultimately act in this area on doubts or simply a lack of complete confidence; and that the ultimate determination and judgment of the executive are not judicially reviewable. Notwithstanding the discretionary nature of the ultimate judgment, however, petitioners contend that Mrs. Brawner is constitutionally entitled to an opportunity, in a hearing, to put her case before the officials who are to make the judgment before they exercise their discretion. This notion of a constitutionally required hearing for action which may, if necessary, be based on no more than doubt and which itself is not judicially reviewable has no analogue in the law. As Judge Wyzanski observed in *Von Knorr v. Miles*, 60 F. Supp. 962, 971 (D. Mass.), judgment vacated on

other grounds *sub nom. Von Knorr v. Griswold*, 156 F. 2d 287 (C.A. 1): "

Notice, hearing, counsel and the like are admittedly usually appropriate criteria of due process of law. But these guarantees have significance only if in the end the government's right to act turns on an official finding that certain facts exist. Where in rare cases such as orders excluding persons from defense plants in war time, the government's right to act is absolute and not dependent upon the facts concerning, or the merits of, any particular case, the formalities of a notice, hearing and counsel are not requisite. No matter what evidence might be offered by counsel for the government or counsel for the individual, the government would remain legally free to disregard the testimony and rely upon its uncorroborated suspicions. [Citations omitted.]

Prime Minister St. Laurent, in a statement to the Parliament of Canada dealing with the problem of security among government employees, similarly emphasized the non-adjudicative character of security determinations (Dominion of Canada, *House of Commons Debates*, 1951, vol. II, 2d Sess., pp. 1504-1506; see Ass'n of the Bar of the City of New York, *The Federal Loyalty-Security Program* 201 (1956)):

* * * The question at issue is not guilt or innocence of some particular charge. The sole

* Judge Magruder stated for the court of appeals, however, that, if the grounds for vacation of the district court's judgment were incorrect, the court of appeals agreed that no constitutional right was violated: "The full and satisfactory discussion * * * in the opinion of Judge Wyzanski below * * * needs no elaboration by us" (156 F. 2d at 292).

question is whether a certain person can or cannot be entrusted with secret defence material. It would give a completely false atmosphere to the matter if it were assumed that reliability can somehow be put beyond doubt by meeting formal charges—or indeed, that reliability cannot be brought into doubt except on the basis of formal charges. Assessment of character may be the only consideration in some instances. That is not a matter of charges, or of trial or of proof. It is a matter of judgment.

While the political branch of the government has the undoubted power to afford a hearing before taking security measures, notwithstanding the nature of the issue to be determined, we question how the interest in such an "advisory" hearing can rise to constitutional dignity.

5. In summary, the need of military commanders for full control over access to their installations is especially clear; and this control has been exercised without substantial question throughout our history. Commanding officers, in allowing Mrs. Brawner and other employees of private contractors into military installations, convey no right of access in derogation of their absolute control. Rather, these employees are merely granted permission, subject to the ordinary prerogatives of the commanding officer, to enter the base for the convenience and benefit of the United States. In this case, these overriding prerogatives were embodied in the contract of the Gun Factory with the Concessionaire, by the provision preventing the Concessionaire from employing in the Gun Factory any employees not meeting the naval installation's

security requirements or other regulations of the Security Officer (R. 6). The Union's collective bargaining agreement and Mrs. Brawner's employment with the Concessionaire were necessarily subject to this contract with the employer.

C. THE INTEREST IN REPUTATION INJURED BY REFUSAL TO ADMIT A PERSON TO A MILITARY BASE IS NOT INDEPENDENTLY ENTITLED TO CONSTITUTIONAL PROTECTION

We have reserved for separate consideration the claim by petitioners (Pet. Br. 92) that a refusal to admit Mrs. Brawner to the base not only caused her to lose her job but also seriously damaged her reputation. It is our view that, if the interest Mrs. Brawner has in being able to work on a military base is not otherwise entitled to constitutional protection, it is not made so because of the consequential effect such inability may have upon her reputation and that, in any event, restoration of access to the base is not a proper remedy for an injury to reputation as such.

The suggestion that Mrs. Brawner's interest in not having her reputation injured by denial of access to the base is independently entitled to protection must rest largely (although these cases are not cited by petitioners in this regard) on *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, and *Harmon v. Brucker*, 355 U.S. 579. Those cases, however, were very different. In *Joint Anti-Fascist*, the action was, in effect, one to enjoin continuing publication of an alleged libel—i.e., a listing of the organization on the Attorney General's list of subversive organizations. The determination and listing were separate and independent acts unrelated to any action being taken

against the organization itself (the list was to be used in passing upon the qualification of members of the organization for government employment). The publication of the assertion that the organization was in fact "subversive" was libelous *per se*, if untrue, and would clearly have been actionable if made by a private party.

In *Harmon* (not a constitutional case in any event) the action taken—the granting of a less-than-honorable discharge from the Army on the basis of pre-service activity—was a gratuitous labelling unrelated to any other action being taken. The case would have been different had Harmon sought to prevent his discharge from the service, but Harmon, far from objecting to the discharge, conceded that the Army had an absolute right to discharge him for any reason it considered to be in the national interest. His sole complaint, for which this Court gave relief, was that he had a statutory right to receive a certificate of discharge reflecting solely the character of his service.

In this case, however, the government has taken no action beyond the minimum necessary to prevent petitioner Brawner's access to the military base. The government's action was not published in any way except by informing the interested parties, Mrs. Brawner herself, the Concessionaire, and the Union, that she was no longer entitled to enter the base because of "security reasons" (R. 41, 98-99). Security Officer Williams first disclosed that Mrs. Brawner was being denied access for "security reasons" when he was asked by the supervisor of the Concessionaire's cafeterias at the Gun Factory for the reason why her

badge was being withdrawn (R. 98). Similarly, the supervisor did not tell Mrs. Brawner that the badge was being withdrawn for "security reasons" until she asked the reason for this action (R. 41). Admiral Tyree wrote the Union that Mrs. Brawner's badge was revoked because she failed to meet the "security requirements" of the base after the Union had inquired of him as to the basis for the Gun Factory's action (R. 31-32).

The description of the basis for the Gun Factory's action as "security reasons" was necessary to bring the action within the contract between the Concessionaire and the Gun Factory. The latter provided that the Concessionaire agreed not to continue to employ personnel who "fail to meet the security requirements" of the base. Thus, there has been no gratuitous labelling and no characterization has been attributed to petitioner Brawner beyond that inherent in the action itself. If she has been prejudiced, it is only by the fact that she cannot enter a military base. The further publication of Mrs. Brawner's loss of her badge and of the reasons for that action resulted only upon petitioners' election to start this litigation.

In addition, the action of denying Mrs. Brawner access to the base does not imply a determination of fact, as in the *Joint Anti-Fascist* case, that she was disloyal or subversive. The term "security reasons" includes a multitude of reasons, other than disloyalty, relating to possible interference with the military mission of the base, including being accident prone, dishonest, lawless, careless, garrulous, unreliable, overinquisitive or an alcoholic (see Naval Physi-

cal Security Manual, Sections 0156.3, 0250, 0260-0261, *infra*, pp. 99-100). There is no more basis in this record for inferring that the security reason involved here was information connecting petitioner Brawner with Communism than any of the other possible reasons; except that petitioners themselves suggest that the former was in fact the ground (Pet. Br. 10-11). But even if their supposition is correct, the public has not been informed that this is the reason, at least by the government. Furthermore, if the action was in fact taken because of some connection of Mrs. Brawner with Communism, the government's action implies no more than a doubt of her reliability—a doubt consistent with the likelihood, though not sufficiently certain to justify allowing her on a military base where important and secret work is in progress, that she is *in fact* loyal. Cf. *Beilan v. Board of Education*, 357 U.S. 399, 409-411 (Frankfurter, J., concurring); *Lerner v. Casey*, 357 U.S. 468, 478.

It might be argued that the public does not make such distinctions and that the denial of access to a military base for "security reasons" in practical effect operates as a "badge of infamy." We are not at all sure that this is true for persons in occupations like Mrs. Brawner's which the public does not connect with military secrets. But, even if this contention were correct, we submit that legitimate governmental activities cannot be restrained because of such consequential effects. If the interest in working on a military base is itself the kind of interest requir-

ing constitutional procedural protection, the practical consequences of the action taken, including the damage to reputation, may no doubt be considered in balancing the fairness of the procedures provided. But if the interest directly acted upon (access to a military base) is not so protected, so that the official action in denying access is lawful and privileged, it cannot be deemed unlawful because of the consequential damage to reputation.

Our point is not that an injury to reputation may not be weighed in formulating the ultimate judgment whether to recognize a person's interest in working on a military base as a constitutionally-protected interest in "property" or "liberty," but that it does not form an independent basis for granting the relief sought. The distinction can be more clearly seen in the case of dismissals from government employment, where the action may be taken on other than security grounds. In the context of government employment, we have contended that, since employees may constitutionally be dismissed on other grounds which involve injury to reputation without a hearing (see the cases cited *supra*, p. 74), they may also be dismissed on security grounds without a hearing. Similarly, since persons may be denied access to military bases for reasons other than security grounds without a hearing, they may be denied access on security grounds by the very same method. A reflection on reputation would justify, not reinstatement of petitioner Brawner's badge (which must depend upon an independent right to enter the naval base as

such), but at most the recognition of a cause of action for damages."

As we have emphasized, the fundamental issue in this case is that of the separation of powers: Whether the traditionally plenary power of the executive to control entrance to military bases in the course of executive operations, and to determine with whom and on what terms it will deal in its proprietary capacity, can, or should be, subjected to judicial control. As we have framed the constitutional issue, it is whether the interest one has in being permitted by the government to have access to a military base amounts to "liberty" or "property" within the meaning of the Fifth Amendment. Stating the issue in those terms, and analyzing it in terms of the nature of the interests affected and not simply in terms of the substantiality of the impact of the government's action upon the individual, is, we believe, required by the history of the due process clause. We have also

⁴⁵ We do not suggest that there has been consent to suit on any such cause of action. Cf. *Dupree v. United States*, 247 F. 2d 819 (C.A. 3); *Dupree v. United States*, 141 F. Supp. 773 (C. Cls.); 28 U.S.C. 2680(h).

tried to show that the position advocated by petitioners in this case—the application of procedural due process requirements to action of the government in its proprietary capacity as governor of its military posts, not affecting any recognized legal interests—requires a very significant and unhistorical extension of the role of the courts in supervising the activities of government. For over a century and a half the executive has borne the complete responsibility for determining who will be allowed to enter military bases, accountable to the electorate (as well as in large measure to Congress) for the inadequacy or the excessiveness with which this responsibility may be exercised.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be affirmed.

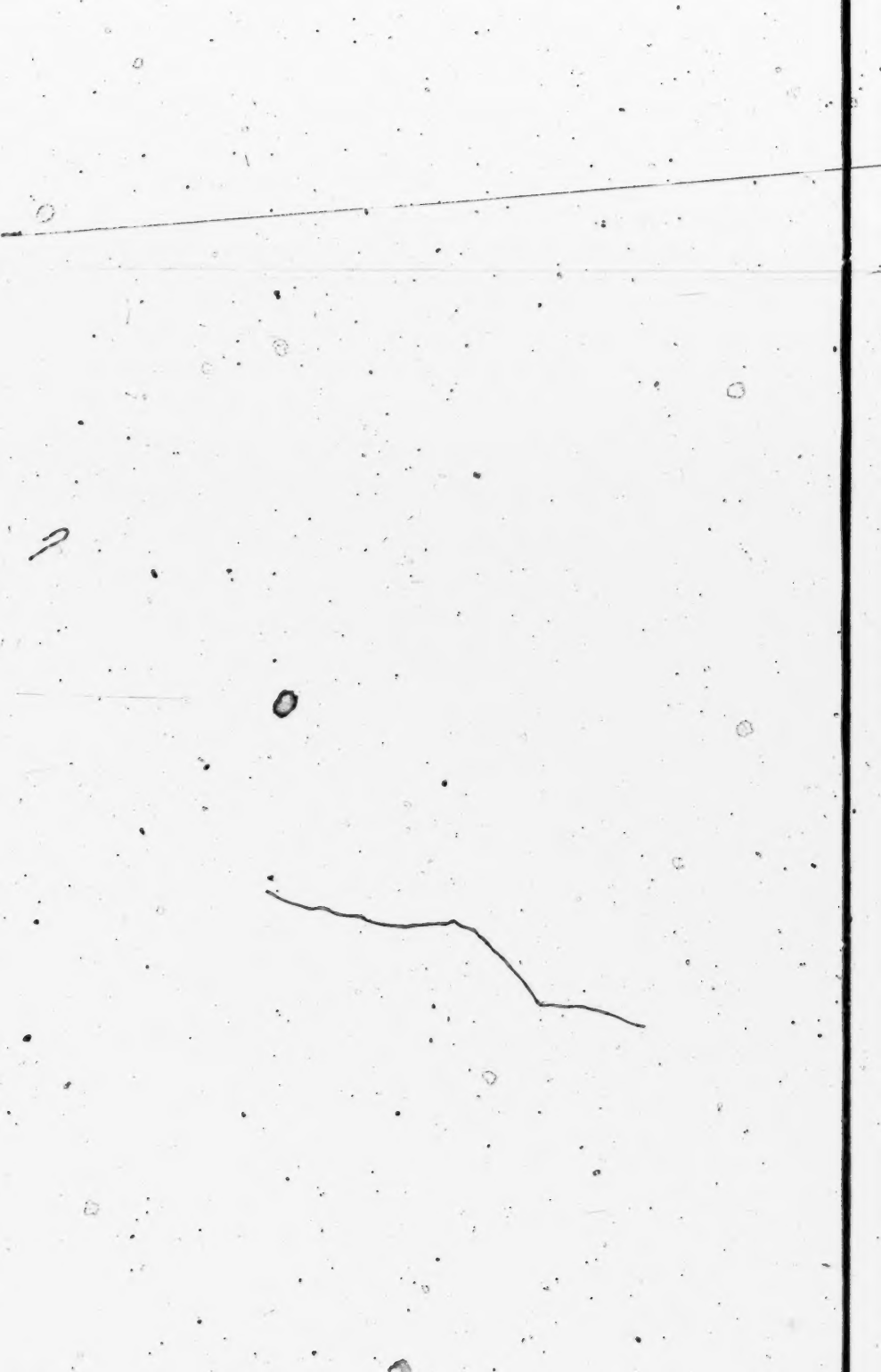
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Attorneys.

JANUARY 1961.



APPENDIX

5 U.S.C. 22:

Departmental Regulations; withholding of information from public not authorized.

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it. * * *

10 U.S.C. 5031:

Secretary of the Navy: responsibilities; compensation.

(a) There is a Secretary of the Navy, who is the head of the Department of the Navy. He shall administer the Department of the Navy under the direction, authority, and control of the Secretary of Defense.

* * * *

(c) The Secretary of the Navy has custody and charge of all books, records, and other property of the Department.

10 U.S.C. 6011:

Navy Regulations.

United States Navy Regulations shall be issued by the Secretary of the Navy with the approval of the President.

18 U.S.C. 1382:

Entering military, naval, or Coast Guard property.

Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation; or

Whoever reenters or is found within any such reservation, post, fort, arsenal, yard, station, or installation, after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof—

Shall be fined not more than \$500 or imprisoned not more than six months, or both.

United States Navy Regulations, August 9, 1948:

THE SECRETARY OF THE NAVY, WASHINGTON,
9 August 1948.

The following Regulations are issued in accordance with the provisions of section 1547 of the Revised Statutes of the United States, for the government of all persons in the Naval Establishment.

All regulations, orders, and instructions inconsistent therewith are hereby revoked.

/s/ JOHN L. SULLIVAN

THE WHITE HOUSE, 9 August, 1948.

Approved:

/s/ HARRY S. TRUMAN.

Article 0701. RESPONSIBILITY OF THE COMMANDING OFFICER

1. The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The authority of the commanding officer is commensurate with his responsibility, subject to the limitations prescribed by law and these regulations. While he may, at his discretion, and when not contrary to law or regulations, delegate authority to his subordinates for the execution of details, such delegation of authority shall in no way relieve the commanding officer of his continued responsibility for the safety, well-being, and efficiency of his entire command. * * *

Article 0704. EFFECTIVENESS FOR SERVICE

The commanding officer shall:

1. Exert every effort to maintain his command in a state of maximum effectiveness for war service consistent with the degree of readiness prescribed by proper authority. * * *

Article 0733. RULES FOR VISITS

1. Commanding officers are responsible for the control of visitors to activities of the Department of the Navy and shall comply with the relevant provisions of the U.S. Navy Security Manual for Classified Matter and other pertinent directives.

2. Commanding officers shall take such measures and impose any restrictions on visitors as necessary to safeguard the classified matter under their jurisdiction. * * *

Article 0734 DEALERS, TRADESMEN, AND AGENTS

In general, dealers or tradesmen or their agents shall not be admitted within a com-

mand, except as authorized by the commanding officer:

1. To conduct public business
2. To transact specific private business with individuals at the request of the latter
3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command.

Article 1502. CONTROL OF CLASSIFIED MATTER

The Chief of Naval Operations shall supplement these regulations with detailed instructions to insure the proper control of classified matter. Such instructions shall include the United States Navy Security Manual for Classified Matter, Registered Publication Manual, Communication Instructions, Armed Forces Industrial Security Regulation and such others as may from time to time be issued. All such publications shall have the full force and effect of these Regulations.

United States Navy Security Manual for Classified Matter (October 2, 1954):

CHAPTER 14—VISITOR CONTROL

Articles 1401-1404 and Article 1409 are printed at R. 116-119.

1411. ESCORTING VISITORS

All visitors, except members of the United States Armed Services who have been properly cleared, shall be escorted. "Escorts" are responsible to commanding officers to assure that the visitor has access to only that information for which he has been authorized. When available, escorts shall be members of the naval

service. If a member of the naval service is not available, a competent employee of the Naval Establishment may be designated.

CHAPTER 15*

PERSONNEL SECURITY INVESTIGATIONS AND CLEARANCES FOR ACCESS TO CLASSIFIED MATTER

Section 1

PERSONNEL SECURITY INVESTIGATIONS

1501. RESPONSIBILITY

1. The Chief of Naval Operations (Director of Naval Intelligence), when requested by competent authority, shall be responsible for conducting security investigations of the following:

a. Military and civilian personnel of the Naval Establishment.

b. Private contractors and contractors' employees requiring access to classified matter. (Refer to the Armed Forces Industrial Security Regulations, OPNAV Instruction 5540.8.)

United States Navy Security Manual for Classified Information (March 10, 1958):

SECTION 1—GENERAL

1401. RESPONSIBILITY

*The provisions of this chapter relate only to the investigative and clearance requirements for access to classified matter and have no bearing on the investigative requirements for employment of civilian personnel within the Naval Establishment or the acceptance of personnel for the naval service. Requirements relating thereto are contained in appropriate instructions issued by the Bureau of Naval Personnel, the Office of Industrial Relations, Commandant of the Marine Corps, or higher authority.

2. Persons in a command status shall be responsible for the security control of visitors within the limits of their jurisdiction. They shall promulgate such additional directives as are necessary for the control of visitors within their respective commands.

1402. VISITORS

The term "visitors" as used herein for security purposes applies as follows:

1. A visitor on board a ship or aircraft is any person who is not a member of the ship's company or not a member of a staff using the ship as a flagship.

2. A visitor to a naval shore establishment is any person who is not attached to or employed by the command or staff using that station as headquarters.

1403. CATEGORIES OF VISITORS

Persons who are considered visitors as described in article 1402 are divided into three basic categories which are further subdivided as follows:

Category One—United States citizens and immigrant aliens, except those representing a foreign government or a foreign private interest.

Alfa—Personnel of the Executive Branch of the Government involved in day to day working relations with members of the activity of the Naval Establishment to be visited and personally known to them.

Bravo—Other Department of Defense and United States Coast Guard personnel.

Charlie—Personnel of private facilities under contract to the Department of Defense.

Delta—Other employees of the Executive Branch of the Government.

Category Two—United States citizens and immigrant aliens not described in Category One.

Alfa—Representatives of a foreign government or military service.

Bravo—Representatives of a foreign private interest.

Charlie—Other United States citizens and immigrant aliens.

Category Three—Foreign nationals (including foreigners in the United States on nonimmigration visas).

Alfa—Representatives of a foreign government or military service.

Bravo—Representatives of a foreign private interest.

Charlie—Foreign nationals in the United States sponsored by a military department, or other foreign nationals employed on military projects, either as contractor's employees or departmental employees.

Delta—Other Foreign nationals.

1404. RESPONSIBILITIES OF THE COMMAND BEING VISITED

1. The commanding officer of the activity being visited has full discretion as to whether or not the visit shall be permitted. * * *

1407. VISITOR CONTROL AND ESCORT

In order to protect the classified information under his jurisdiction the commanding officer shall cause the movements of all visitors to be restricted as he may deem necessary. When escorts are utilized, they are responsible to the commanding officer to ensure that the visitor has access only to that information which he has been authorized to receive. Escorts may be either military or civilian members of the Naval Establishment.

SECTION 2—UNCLASSIFIED VISITS

1408. GENERAL

1. Visits to activities of the Naval Establishment by persons who will not have access to classified information do not require authoriza-

tion from the Chief of Naval Operations (Director of Naval Intelligence). The commanding officer concerned is responsible for the conditions under which such visits are permitted, provided, however, that all visitors in categories Two Alfa and Bravo, and Three, shall be accompanied by a competent escort (refer to article 1407), except during general visiting (see article 1409).

SECTION 3—CLASSIFIED VISITS

1414. VISIT CLEARANCES

1. Visits to activities of the Naval Establishment by persons who will have access to classified information shall be processed in accordance with the requirements of Table C and article 1415 below. A visitor will be considered to have "access" to classified information when he is permitted to gain knowledge of such information through observation or discussion. This term is also interpreted to mean that a visitor will have access when classified information is exposed in such a manner in the space being visited, or en route to the space to be visited, that he will gain knowledge through observation alone.

United States Navy Physical Security Manual (April 14, 1956):

0154. THE COMMANDING OFFICER. The Commanding Officer is responsible for the security of all property and installations within his command. He prescribes the security measures to be adopted, and coordinates when necessary, the measures adopted by subordinates, but he alone remains responsible for the overall security of his command.

0156. THE SECURITY OFFICER. Normally, the Commanding Officer delegates most of the ad-

ministrative and operational aspects of security to a subordinate, who is referred to in this manual as the Security Officer. The functions of this officer include planning, supervision, inspection, coordination, and submission of recommendations with respect to:

a. Physical security

- (1) Internal security
- (2) External security
- (3) Physical protection
- (4) Guard ceilings

b. Liaison with security and safety agencies.

0156.3. SPECIFIC DUTIES. The planning, supervision and coordination of matters relating to the security of the command includes:

a. *Internal security matters:*

(1) Safeguarding from espionage and sabotage and the unauthorized disclosure of classified matter.

(2) Safeguarding from any incident which might jeopardize the normal activity of the command such as theft, robbery, riot, lawlessness, etc.

(3) Coordination of fire protection agencies and station fire departments with the law enforcement agencies and guard force.

0250. SECURITY HAZARDS

* * * * *

After the critical and/or vulnerable portions of the activity or facility within the activity have been decided upon, the command must determine the probability of damage to the activity or facility from:

- a. Hazards inherent in daily operations such as accidents.
- b. Espionage.
- c. Sabotage.

These hazards have been listed in the order in which they are most likely to occur.

0260. HAZARDS INHERENT IN DAILY OPERATIONS

A security program is not confined to meeting the most hazardous situations.

It is a continuing program beginning in peace time and expanding to meet the particular hazards of formal hostilities. Increased operation naturally intensifies routine hazards. Specific hazards within any activity depend on such variables as the type of activity, activity layout, the effectiveness of the organized security program, location, topography, etc.

0261. ACCIDENTS. Accidents in whatever form, whether they result in damage to equipment and/or material, or to loss of life or limb are security hazards. In whatever degree they occur, accidents will inevitably impede the effectiveness of the command to insure uninterrupted maximum continuation of its mission. A well organized accident prevention program is the only means by which this hazard to security can be minimized.

0540. VISITOR IDENTIFICATION AND CONTROL SYSTEM

For the purpose of this manual, the term "visitor," in addition to its normal connotation, is defined as including employees and others who require infrequent access to security areas or one to whom permanent employee-type identification for such areas has not been issued.

0542. CONTRACTORS. Contractor's employees performing work in a security area should be provided with and be required to wear a distinctive badge. There are three general types of contractor's employees:

a. Employees on substantial or construction projects requiring a considerable period to complete. The contract work area should be isolated by means of a fence or other effective barrier. When possible, contractor's employees should enter the work area directly with-

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at entering the security area. Where it is necessary for the contractor's employees to enter a security area to reach the work area, the guard force personnel should insure that the contractor's personnel go directly to the work area without loitering or straying within the security area. If the work area is segregated, and abutting security areas or portions of abutting security areas are properly guarded, contractor's employees should wear distinctive badges and their loyalty should be checked for by their employer.

b. Employees performing work at regular or irregular intervals and for a short working period within a security area should be handled by the same procedure adopted for the control of visitors.

c. Employees performing continuous service for the activity within a security area should be handled by the same procedure adopted for regular activity personnel.

ent portions of the agreement of December , between the Board of Governors of the Naval Gun Factory and M & M Restaurants, Inc., the Concessionaire:

ARTICLE IX. PROVISION FOR YARD SECURITY AND REGULATIONS

(b) Approval for the employment of any person by the Concessionaire to work in the Naval Gun Factory, in connection with the operation of the cafeterias and food services covered by this agreement, shall be conditioned on the right of the Superintendent, or his duly designated representative, to cancel, refuse or withdraw the same for any cause or reason deemed sufficient by the Superintendent, his representative, in the exercise of discretion, without the necessity for any showing of

cause. Upon notice of the cancellation, revocation or withdrawal of the approval for the employment of any person, the Concessionaire shall immediately terminate the employment of such person, his or her identification badge shall be taken up, and such person shall not thereafter be allowed in the Naval Gun Factory or perform any duties in connection with the cafeterias and food services covered by this agreement.

(c) The Concessionaire undertakes and agrees that all employees shall accept, agree to comply with and be bound by the "Regulations of the Naval Gun Factory" as now existing or hereafter amended, supplemented or superseded; and that notice of this provision shall be given each employee, and acquiescence therein shall be obtained from him or her, immediately upon employment.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960.

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*

vs.
NEIL H. McELROY, Individually; THOMAS S. GATES,
Individually and as Secretary of Defense; D. M.
TYREL, Individually and as Superintendent of the
United States Naval Gun Factory; and W. C.
WILLIAMS, Individually and as Security Officer of
United States Naval Gun Factory, *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

BERNARD DUNAE
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Washington 6, D. C.
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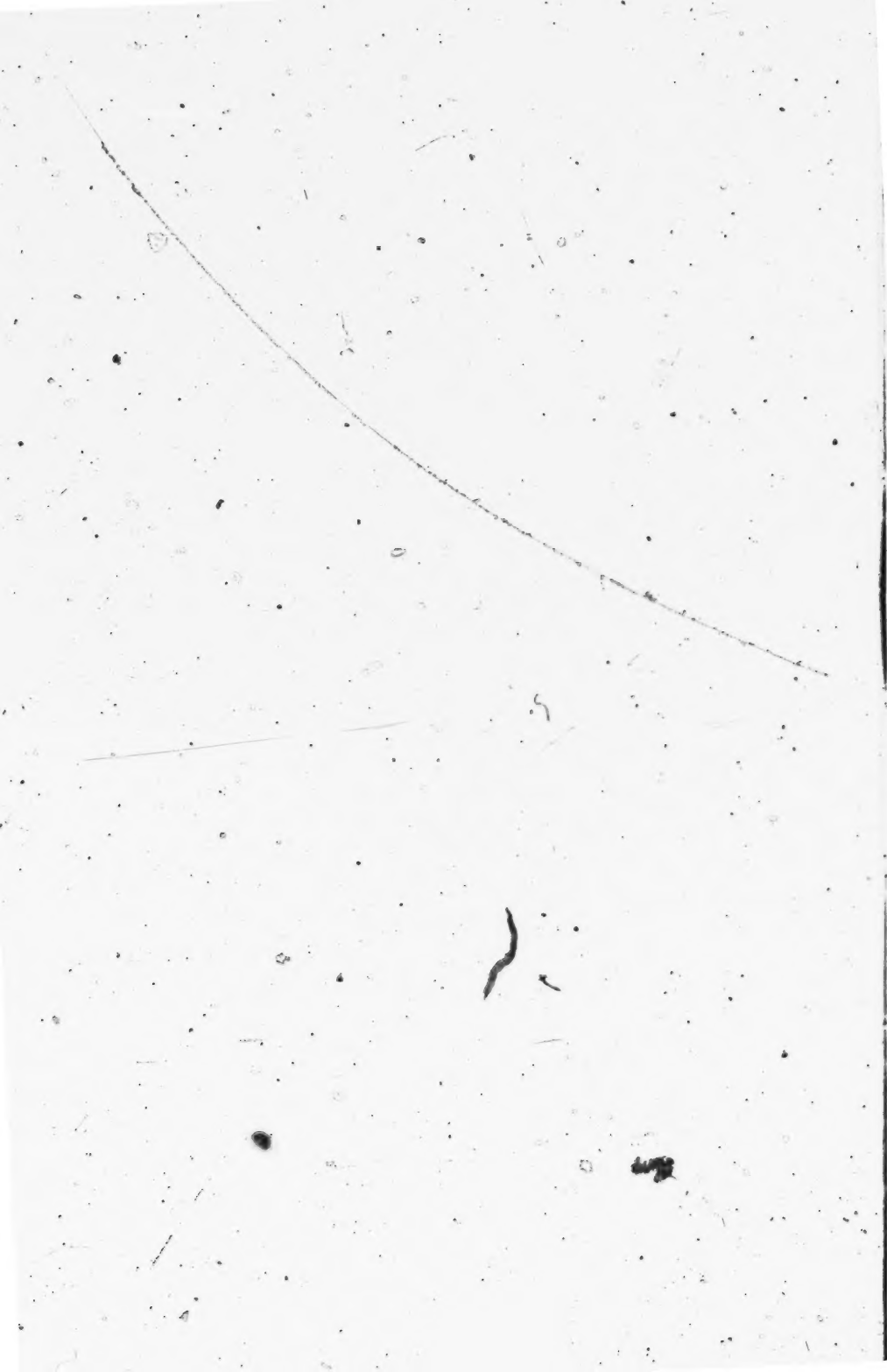
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Brown, Loyalty and Security, 3 (1958)	18
Dicey, Law of the Constitution, 193-194 (10th ed. 1959)	14
Griswold, The Fifth Amendment Today, 39 (1955) ..	27
H. Rep. No. 842, 85th Cong., 1st Sess., 9-10	8
Harper and James, The Law of Torts, Vol. 2, pp. 1362-63 (1956)	16
JAGA 1555/4105, May 2, 1955	19
JAGA 1955/4910, May 19, 1955	19
7 Moore's Federal Practice (2d ed.) ¶73.12	7, 8
O'Brien, New Encroachments On Individual Freedom, 66 Harv. L. Rev. 1, 19 (1952)	27
Report of the Special Committee on the Federal Loyalty-Security Program, Association of the Bar of the City of New York, IX (1956)	18
Restatement, Agency 2d	
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Robertson & Kirkham, Jurisdiction of the Supreme Court of the United States, § 128 (Wolf. and Kur. ed. 1951)	10
S. Rep. No. 2129, 85th Cong., 2d Sess., 2-3	8



IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

No. 97

CAFETERIA AND RESTAURANT WORKERS UNION, LOCAL
473, AFL-CIO, AND RACHEL M. BRAWNER, *Petitioners*

v.

NEIL H. McELROY, Individually; THOMAS S. GATES,
Individually and as Secretary of Defense; D. M.
TYREE, Individually and as Superintendent of the
United States Naval Gun Factory; and H. C.
WILLIAMS, Individually and as Security Officer of
United States Naval Gun Factory, *Respondents*

On Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS

**I. THE STATUS OF NEIL H. McELROY AS A PARTY TO THIS
PROCEEDING**

It is contended that Neil H. McElroy has ceased to be a party to the action in his individual capacity (Res. br. p. 6, n. 6). We had thought that respondents would put this matter in issue by moving the Court to dismiss as to Neil H. McElroy, but no motion has been filed.

On May 24, 1960, the petition for a writ of certiorari was filed in this case. Subsequent thereto, during the pendency of the petition, the Court of Appeals dismissed the appeal as it relates to Neil H. McElroy individually. The first question presented, therefore, is the power of the Court of Appeals to dismiss an appeal as to a party who has already been named as a respondent in a petition for a writ of certiorari pending before this Court. Consideration of the question requires a fuller preliminary statement of the manner in which it arises.

A. The Facts

The action in this case was commenced *inter alia* against Neil H. McElroy, individually and as Secretary of Defense, and Thomas S. Gates, individually and as Secretary of the Navy (R. 2). On December 1, 1959, Neil H. McElroy resigned as Secretary of Defense, and on December 2, 1959, Thomas S. Gates was appointed Secretary of Defense. Thereafter, on February 3, 1960, petitioners moved the Court of Appeals to supplement the record to show that (1) the "action against Defendant Thomas S. Gates continues . . . individually and as Secretary of Defense," and (2) the "action . . . continues against Neil H. McElroy individually in order to recover against him damages for the harm inflicted by his performance of an unauthorized act" (R. 140). In answer, respondents did not object as to Thomas S. Gates, but as to Neil H. McElroy they "respectfully submitted that the action as to him should abate, and not be continued against him in his individual capacity . . ." (R. 141).

Thereafter, on April 14, 1960, the Court of Appeals rendered its *en banc* decision affirming the District

Court's judgment dismissing the complaint (R. 144). Then, on April 25, 1960, the Court of Appeals ordered that "the motion to supplement the record is denied, without prejudice to filing by appellants of a motion to substitute party appellees as provided for by Rule 5(d) of the Federal Rules of Civil Procedure and without prejudice to filing by appellees of a motion to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity" (R. 143). On April 27, 1960, petitioners moved the Court of Appeals "to substitute Appellee Thomas S. Gates as the party appellee in the office of Secretary of Defense" (R. 184). On May 18, 1960, the Court of Appeals ordered that Thomas S. Gates, Secretary of Defense, is substituted as an appellee in his office of Secretary of Defense in the place and stead of Neil H. McElroy as Secretary of Defense" (R. 186). Then, on May 24, 1960, the petition for a writ of certiorari was filed, in which petitioners *inter alia* named as respondents "Neil H. McElroy, Individually; Thomas S. Gates, Individually and as Secretary of Defense."

Subsequent to the filing of the petition for the writ, during its pendency but before its grant, the Court of Appeals on June 2, 1960 entered an order reciting that "Upon consideration of appellees' motion to dismiss this appeal as to Neil H. McElroy individually, it is Ordered by the court that insofar as this appeal relates to Neil H. McElroy as an individual the appeal is dismissed" (R. 189). Receipt of this order was petitioners' first notice that any motion to dismiss as to Neil H. McElroy had been filed and was pending, as petitioners later informed the Court of Appeals. At the time of filing the petition for a writ of certiorari, counsel for appellants did not know that there

were any pending motions before this Court. . . . Receipt of this order [of dismissal] on June 3, 1960 was the first knowledge that counsel for appellants had of the pendency of a motion to dismiss the appeal as to Neil H. McElroy. Counsel for appellants had not before then received any such motion" (R. 193).

Respondents frankly admitted lack of service of the motion. As they informed the Court of Appeals, "proper service was not made due to our apparent mistake" (R. 191). As they elaborated (R. 190-191):

The appellees, on May 3, 1960, moved to dismiss the appeal as to Neil H. McElroy as an individual which motion was granted by the court by order dated June 2, 1960. On June 3, 1960, Mr. Bernard Dunau, counsel for appellants, telephonically advised that he had just received a copy of the court's order of June 2, 1960, but that he had not received a copy of the appellees' motion, and that had he received the motion he would have filed an opposition thereto. We immediately made a check in an effort to verify the question of service. It appears, as best we can ascertain, that a letter of transmittal of the motion to Mr. Dunau was prepared. However, our Division mailroom which should have a record of the letter if it was sent in the normal course, contains no such record of the transmittal letter to Mr. Dunau having been sent. In view of that and the fact that Mr. Dunau did not receive a copy of the motion, we regret that we must conclude that a letter transmitting the motion was not, in fact, sent due to some administrative inadvertency. A copy of our motion of May 3, 1960 is being forwarded to Mr. Dunau today along with a copy of this motion.

Thus, the motion "to dismiss this appeal as to appellee Neil H. McElroy in his individual capacity," while

filed on May 3, 1960, was not served until June 7, 1960 (R. 190-191), well after the petition for the writ of certiorari had been filed.

Upon discovery of these facts, respondents on June 7, 1960 moved the Court of Appeals to reconsider and reaffirm the order of June 2, 1960 dismissing the appeal as to Neil H. McElroy in his individual capacity (R. 190-191). Petitioners cross-moved the Court of Appeals "to vacate the order of June 2, 1960; and to deny appellees' motion to dismiss of May 3, 1960, without prejudice to the filing of a motion to dismiss in the Supreme Court of the United States or in any further proceedings which may eventuate from the proceedings in the Supreme Court of the United States" (R. 192). In explanation, petitioners stated in part that (R. 193-194):

In the absence of service of the motion to dismiss the appeal as to Neil H. McElroy, it would appear that the order of June 2, 1960, granting that motion should be vacated for lack of notice of and opportunity to be heard on the motion. Furthermore, the order was entered on June 2, 1960, subsequent to the filing of the petition for a writ of certiorari on May 24, 1960. Consequently, the order was entered after the case was already before the Supreme Court.

The "Motion to Reconsider and Reaffirm the Court's Order of June 2, 1960 Granting Appellees' Motion to Dismiss as to Neil H. McElroy in His Individual Capacity," served on June 6, 1960, is in substance a renewal of the original motion to dismiss. Since the case is presently pending before the Supreme Court, this Court would appear to have no jurisdiction to entertain a motion to dismiss an appeal which is no longer before it. In any event, even if jurisdiction exists, comity sug-

gests that this Court should stay its hand and decline to dismiss an appeal as to a party who has already been named as a respondent in a petition for a writ of certiorari pending before the Supreme Court. In short, the case is now before the Supreme Court, and any further action to secure dismissal as to Neil H. McElroy should be taken in the proceedings before that court.

On June 30, 1960, the Court of Appeals ordered that "appellees' motion to reconsider is granted and the order of this court entered herein on June 2, 1960, dismissing this appeal insofar as it relates to Neil H. McElroy as an individual is reaffirmed" (R. 198).

B. Lack of Power in the Court of Appeals to Dismiss an Appeal as to a Party After a Petition for a Writ of Certiorari Has Been Filed

The Court of Appeals had no power to dismiss the appeal as to Neil H. McElroy in his individual capacity after the petition for a writ of certiorari had been filed. Analysis may begin with Rule 73(a) of the Federal Rules of Civil Procedure, governing appeals from a District Court to a Court of Appeals. It states in part that:

A party may appeal from a judgment by filing with the district court a notice of appeal. . . . If an appeal has not been docketed, the parties, with the approval of the district court, may dismiss the appeal by stipulation, filed in that court, or that court may dismiss the appeal upon motion and notice by the appellant.

This means that, before the appeal is docketed, the District Court is empowered to dismiss the appeal by agreement or at the instance of the appellant. It is divested even of this power once the appeal has been

docketed. And it never has power to dismiss an appeal at the instance of the appellee. See *United States v. Frank B. Killian Co.*, 269 F. 2d 491, 494 (C.A. 6); 7 Moore's Federal Practice ¶73.12 (2d ed.). The pertinent principle has been stated by this Court (*Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177):

"One general rule in all cases (subject, however, to some qualifications) is that an appeal suspends the power of the court below to proceed further in the cause." Undoubtedly, after appeal, the trial court may, if the purpose of justice require, preserve the status quo until decision by the appellate court. . . . But it may not finally adjudicate substantial rights directly involved in the appeal.¹

The identical principle obtains upon direct appeal to this Court from a judgment of a District Court. 28 U.S.C. §§ 1252, 1253. "When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken, perfected, and prosecuted pursuant to law and the Rules of the Supreme Court of the United States governing such an appeal." Rule 72, Fed. R. Civ. Proc. This Court's Rule 14(1) provides that:

After a notice of appeal has been filed, but before the case has been docketed in this court, the parties may at any time dismiss the appeal by stipulation in the court possessed of the record, or that court may dismiss the appeal upon motion and notice by the appellant. For dismissal after the case has been docketed, see Rule 60 [not here relevant].

¹ And see *In re Allen*, 115 F. 2d 936, 939 (C. C. P. A.): "The general rule is that where an appeal has been taken the effect of which is to transfer jurisdiction of the cause to the appellate court, the court from which the appeal is taken can proceed no further with respect to the subject matter of the appeal until the appeal has been disposed of."

Rule 14(1) of this Court's rules and Rule 73(a) of the Federal Rules of Civil Procedure are thus identical. Both divest the lower court of any power to dismiss an appeal once it has been docketed. And the lower court never has power to dismiss an appeal over the objection of the appellant. The controlling principle, modified only as to an agreed dismissal or one at the instance of the appellant before the appeal is docketed, is that "the filing of a notice of appeal deprives the district court of power to proceed any further in the matter. . . ." 7 Moore's Federal Practice §73.12 (2d ed.).²

No different principle is deducible when the route to appellate review is from the Court of Appeals to this Court by way of a petition for a writ of certiorari. Indeed, since the filing of the petition and the transcript of record coalesce (Rule 21(1)), there is not even a hiatus preceding docketing during which petitioner by stipulation or on his own motion can have his own petition dismissed in the Court of Appeals (Rule 60). And orderly procedure commands that once the petition for the writ has been filed the power of the Court of Appeals to affect the merits ceases. It would be intolerable were the character of the cause subject to the power of the lower court to alter it in the interim between the filing of the petition and its

² Other situations illustrate the principle. On enforcement or review of an order of an administrative agency the court acquires exclusive jurisdiction upon the filing of the record with it. P.L. 85-791, 72 Stat. 941, enacted Aug. 28, 1958, §§ 3(d), 4(d), 10, 14, 15, 16(b), 19(b), 25, 26, 30(b); S. Rep. No. 2129, 85th Cong., 2d Sess., 2-3; H. Rep. No. 42, 85th Cong., 1st Sess., 9-10. On removal, written notice to adverse parties and the filing of a copy of the removal petition with the clerk of the State court "shall effect the removal and the State court shall proceed no further unless and until the case is repanded." 28 U. S. C. 1446(e).

disposition. As in this case, where four and one-half months elapsed between the filing of the petition and its grant, many months may transpire before this Court rules upon the petition. This may be due to the intervention of the summer recess, or because the Court chooses to hold the petition pending the determination of a cognate case, or because the Court wishes to search the case closely before acting on the petition. Whatever the reason, and whether the period is short or long, the judgment sought to be reviewed and the status of the case must remain free of alteration by the lower court during the pendency of the petition in this Court.

In this case, the Court of Appeals, during the pendency of the petition, dismissed the appeal as to a party who had been named as a respondent in the petition. No more fundamental alteration of the character of the proceeding could be made than to dismiss a party from it. The petition having operated to transfer jurisdiction to this Court, the Court of Appeals was without power to dismiss a party from the proceeding.³

³ In the court below respondents argued, as they do in this Court (Res. br. p. 6, n. 6), that "Only after a writ of certiorari is granted would . . . [the] Court [of Appeals] lose jurisdiction of the case" (R. 196). Neither of the two cases cited in support have any relevance. *Magnum Import Co. v. Coty*, 262 U.S. 159, 163-164, holds that a Court of Appeals need not "withhold its mandate or . . . suspend the operation of its judgment or decree pending application for certiorari to us." But it is a far cry from declining to stay a judgment to altering its character during the pendency of a petition. *Waskey v. Hammer*, 179 F. 273 (C. A. 9), states that the issuance of a writ of certiorari operates as a supersedeas. But see *Magnum Import Co. v. Coty*, 262 U.S. 159, 164.

C. No Availability of or Need to File a Petition for a Writ of Certiorari to Review the Dismissal Orders Entered After the First Petition for the Writ Had Been Filed

Respondents contend that, "Since petitioners have not filed a petition for a writ of certiorari from the June 30 order, the dismissal of Mr. McElroy is now final" (Res. br. p. 6, n. 6). The next question therefore is whether it was necessary, in order to preserve the issue, to have filed a petition for a writ of certiorari seeking review of the orders of June 2, 1960 and June 30, 1960 dismissing the appeal as to Neil H. McElroy.

A petition need not and could not have been filed. "Cases *in* the courts of appeals may be reviewed by the Supreme Court by . . . writ of certiorari . . ." 28 U.S.C. 1254(1), emphasis supplied. The "condition attached to the grant is that there shall be a case 'in' the court of appeals."⁴ There was no case "in" the Court of Appeals when it entered its dismissal orders. The case had been transferred from the Court of Appeals to this Court by the earlier filing of the petition for a writ of certiorari. No case being "in" the Court of Appeals, no new petition could have been filed.

Nor was there need to file an ordinary petition or to seek leave to file a petition for an extraordinary writ. This Court without more possesses full power to protect the plenary jurisdiction it had acquired over the whole of the case. The case in its entirety had already been transferred to this Court. When brought to this Court Neil H. McElroy was a party to the case. No action in or by this Court dismissed him from the case.

⁴ Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States*, § 128 (Wolf, and Kur, ed. 1951).

To effect his dismissal requires a motion to that end filed in this Court or *sua sponte* action by this Court. If a motion to dismiss were filed in this Court in reliance upon the dismissal of the appeal by the court below, or if this Court were to consider *sua sponte* the effect of the dismissal below, the orders below would be found to be nullities because entered without jurisdiction. Cognizance of them would therefore be withheld. Hence the continuance of Neil H. McElroy as a party to the proceeding in this Court, and in any further proceedings which may eventuate, would not and could not be affected by the *ultra vires* orders below.

In short, Neil H. McElroy was a party to the proceeding when this Court acquired jurisdiction of the cause. No subsequent order of any other court could displace this Court's power over him. And no independent review of the subsequent order need be sought to repel its entrenchment upon this Court's previously acquired jurisdiction over the case and the parties to it.

D. Respondents' Answerability in Damages for the Injury Caused by the Wrong Committed

Of course the purpose of continuing Neil H. McElroy as a party to the proceeding is to maintain his answerability in damages for the injury caused by the wrong committed. This presents the fundamental question whether he and the other respondents are responsible for monetary indemnification of the victim of their tort.

The gravamen of the wrong is injury caused by action taken in excess of authority or under an authority not validly conferred. If his action is unau-

thorized or unconstitutional,⁵ the governmental officer stands "stripped of his official or representative character and is subject in his person to the consequences of his individual conduct." *Ex parte Young*, 209 U.S. 123, 160. And one of the consequences to which a functionary who acts in excess of his authority "is subject in his person" is liability for payment of damages for the injury he inflicts.

Analysis begins with *Barr v. Matteo*, 360 U.S. 564. The absolute immunity from civil suit for damages regardless of the actor's motives extended by that decision to executive officers is premised upon action taken *within the scope of authority*. Stress upon the sweep of the immunity tends to overlook this crucial condition to its grant. Yet the decision is unmistakably predicated upon this limitation. The plurality opinion held that the occasion was privileged because the officer's act was in the "exercise of discretionary authority." 360 U.S. at 575. The same qualification is expressed in the opinion's quotation from *Spalding v. Vilas*, 161 U.S. 483, 498-499, in which the officer's immunity is confined to acts "keeping within the limits of his authority," a restriction reiterated by the later reference to his privilege "if he acts, *having authority*. . . ." 360 U.S. at 570 (emphasis supplied). The quotation from *Gregoire v. Biddle*, 177 F. 2d 579, 581 (C.A. 2), similarly cabins the privilege by its statement that "The decisions have, indeed, always imposed as a limitation upon the immunity that the

⁵ Unconstitutional conduct is of course unauthorized conduct. "The only difference is that . . . [in the case of unconstitutional conduct] the power has been conferred in form but the grant is lacking in substance because of its constitutional invalidity." *Larson v. Domestic and Foreign Commerce Corp.*, 327 U.S. 682, 690.

official's act must have been within the scope of his powers. . . ." 360 U.S. at 572. The concurring opinion observed that the officer's act "was neither unauthorized nor plainly beyond the scope of . . . [his] official business. . . ." 360 U.S. at 577-578. And a dissenting opinion was based on disagreement that the act was within the scope of authority. 360 U.S. at 592.

Accordingly, *Barr v. Matteo* confirms the proposition that "executive officers are not liable in suits for damages for erroneous or even malicious conduct in office, so long as they are acting within the scope of the authority given them." Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Ref. Com. v. McGrath*, 341 U.S. 123, 157, n. 8 (emphasis supplied). Since immunity does not exist for acts in excess of authority, the "question here is, as it is in all cases where this doctrine of immunity is advanced, were these officials acting within the scope of their authority in the performance of the duties of their respective offices?" *Gibson v. Reynolds*, 172 F. 2d 95, 99 (C.A. 8), cert. denied, 337 U.S. 925. We have shown that respondents' actions in this case were unauthorized or unconstitutional. For that reason respondents are amenable to injunctive relief." And the action which is unauthorized or unconstitutional so as to subject the act to specific restraint does not become authorized or constitutional when the question at issue is recovery of damages. There is no double standard of authorized conduct.

Respondents suggest a double standard by their assertion that "Their action, whether or not authorized,

⁶ *Philadelphia Co. v. Stimson*, 223 U.S. 605, 620; *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-691.

was clearly taken in the performance of their official duties" (Res. br. p. 15, n. 7). But it is no part of the performance of official duty to act in excess of authority. "There could be no exercise of judgment and discretion in performing . . . an act that he had no right to do. When a public officer goes outside the scope of his authority or duty, he is not entitled to protection because of his office, but is liable for his acts like any private individual."⁷ There is no manageable way to gradate the levels of exceeded authority. There is no good reason to attempt it.

What respondents get down to saying is that if action is taken in an official capacity this alone is enough to invoke absolute immunity on behalf of the actor. This Court stopped well short of that abyss in *Barr v. Matteo*, 360 U.S. 564. It goes sufficiently far to hold that within the scope of his authority an officer may act without fear of civil liability regardless of his motives. It goes too far to say that he need not fear even disregard of the limitations upon his authority so long as he acts under color of office.

Dicey long ago gave the fundamental answer to respondents' claim (Dicey, *Law of the Constitution*, 193-194 (10th ed. 1959)):

With us every official, from the Prime Minister down to a constable or a collector of taxes, is under the same responsibility for every act done without legal justification as any other citizen. The Reports abound with cases in which officials have been brought before the courts, and made, in their personal capacity, liable to punishment, or to the payment of damages, for acts done in their official character but in excess of their lawful authority.

⁷ *Town of Randolph v. Ketchum*, 117 Vt. 468, 94 A. 2d 410, 414.

A colonial governor, a secretary of state, a military officer, and all subordinates, though carrying out the commands of their official superiors, are as responsible for any act which the law does not authorize as is any private and unofficial person.

"Doubtless this statement of Dicey's . . . was an idealization of actuality. But in the perspective of our time its validity as an ideal has gained and not lost."⁸ Recently the Canadian Supreme Court strikingly confirmed the principle, holding the Premier of Quebec liable in the amount of \$33,123.53 for action beyond the scope of his authority in ordering the manager of the provincial liquor commission to cancel the liquor license of the plaintiff, an active member of Jehovah's Witnesses.⁹ The law is not served by solicitude for officers who act in excess of their authority to the hurt of the citizenry. Compensation of the injured victim is not much of a step towards realization of the ideal of a rule of law.

There remains only to consider whether a distinction should be drawn between the department heads and their subordinates. The liability of the superintendent and the security officer of the Naval Gun Factory is clear. They did the act. Their act is so far unsanctioned that it is devoid even of internal departmental authorization. And "An agent who does an act otherwise a tort is not relieved from liability by the fact that he acted at the command of the principal or on account of the principal. . . ."¹⁰ The liability of the

⁸ Mr. Justice Frankfurter dissenting in *Great Northern Life Ins. Co. v. Read*, 322 U.S. 47, 59, n. 2.

⁹ *Roncarelli v. Duplessis*, [1959] 16 D. L. R. 2d 689.

¹⁰ Restatement, Agency 2d, Sec. 343.

department heads is equally clear. They directed or adopted the act. Their insistence throughout the proceeding that the act was authorized fixes responsibility upon them on the basis of their own individual sanction of the act. And at least from the time of the institution of the lawsuit they knew or should have known of the particular act itself the lawfulness of which was challenged. They had the power to cause its cessation but chose instead to allow its continuance. The responsibility of the department heads is therefore not solely or predominantly vicarious but rests on their "personal fault."¹¹

Rachel Brawner suffered a definite loss of earnings as a result of respondents' wrong. She recovers from respondents or she does not recover. It is unjust that the victim of the tort should bear her own loss.

II. SOME OBSERVATIONS ON RESPONDENTS' ARGUMENT

A. Another Supposed Way to Distinguish *Greene v. McElroy*

Respondents assert that, unlike *Greene v. McElroy*, in which clearance was "denied only on the basis of a fact determination reached through elaborate hearing and appeal procedures," in this case the procedure was altogether summary (Res. br. pp. 23-24). The assumption underlying the distinction is that the serious constitutional question posed in *Greene* because of want of confrontation and cross-examination arose only because a hearing of sorts had been granted. On this premise, provision for a partial hearing presents a grave question whether a full hearing is constitutionally compelled, but if no process is accorded then *due process* cannot be said to be denied.

¹¹ Restatement, Agency 2d, Vol. 1, p. 454. See also, Harper and James, *The Law Of Torts*, Vol. 2, pp. 1362-63 (1956).

Common sense rebels. Murder is not less objectionable than manslaughter. And what common sense repels authority has rejected. In *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, the Attorney General designated organizations as subversive without notice or hearing of any kind. Summary listing constituted a denial of procedural due process. And the Attorney General did not "obtain immunity on the ground that designation is not an 'adjudication' or a 'regulation' in the conventional use of those terms. Due process is not confined in its scope to the particular forms in which rights have heretofore been found to have been curtailed for want of procedural fairness." Mr. Justice Frankfurter, *id.* at 173-174.

B. Respondents' Appeal to History

Respondents assert that internal departmental usage corroborates their authority to act. "This authorization is confirmed by the actual practice of military commanders throughout our history; they have regularly exercised authority to admit or exclude civilians selectively, as they deemed appropriate at the time" (Res. br. p. 38).¹²

The most that respondents show is that military personnel have told each other so often that they can do as they please concerning civilian presence on military land that they have come to believe it must be so. And these self-serving statements do not even relate to the present problem. For action taken on the basis of an adverse security determination is a relatively recent

¹² Reference to the terms upon which the Army and Navy may lease or license the use of military land is irrelevant (Res. br. pp. 45-51). Petitioners do not wish to lease land from the Gun Factory, erect telegraph posts on it, or construct bethels.

invention.¹³ None of the instances cited by respondents pertain to it. The departmental regulations which do cover the subject do not confer but negative the authority asserted (Pet. br. pp. 31-58).

Furthermore, respondents' own showing does not support the unrestricted power they assert even as to the unrelated subjects to which the showing pertains.¹⁴ Discriminatory exclusion "would be considered an abuse of discretion and the party proscribed would have good grounds for complaint" (Res. br. p. 42). In cases of ejection or refusal to admit, "the act constitutes an exercise of legal discretion, and it should be based on substantial conditions of fact" (Res. br. p. 43). The exercise of discretion to admit or exclude is "subject to the limitation that it may not be exercised arbitrarily" (Res. br. p. 52). And so, taken at face value, the only authority which usage confirms is a "legal discretion," to "be based on substantial conditions of fact," which "may not be exercised arbitrarily." Related to this case, respondents' actions were the epitome of arbitrariness, for in the absence of a reasonable procedure there is no meaningful assurance against arbitrariness.

Respondents' own showing confirms the necessity for a hearing if arbitrariness is to be truly guarded

¹³ "Twenty years ago there was no personnel security system in this country." Report of the Special Committee on the Federal Loyalty-Security Program, Association of the Bar of the City of New York, ix (1956). Episodes preceding 1947 did not approach "the experience of the last decade in intensity, in sweep, or in the degree of public concern to which they gave rise." Brown, *Loyalty and Security*, 3 (1958).

¹⁴ It also bears remembering that a hurried and uncritical collection of instances in a brief may be very far from an accurate portrayal of history.

against. Before the solicitation privilege of a life insurance agent within a military post is withdrawn or suspended he must "be afforded an opportunity to be heard" (Res. br. p. 53, n. 32). An automobile insurance salesman is similarly given "opportunity to be heard" (*ibid.*). "In addition, prior to final action the [insurance] company should be afforded an opportunity to explain the instances of misconduct by its agents upon which the proposed banning of all representatives is based." JAGA 1955/4105, May 2, 1955; JAGA 1955/4910, May 19, 1955. If insurance salesmen are given "an opportunity to be heard" and insurance companies "an opportunity to explain," there is not the least basis in reason for asserting that departmental usage authorizes a person to be deprived of employment and stigmatized as a security risk without any hearing or chance to explain.

But even if respondents' showing were all that is claimed for it, it would be essentially irrelevant. The showing is confined to military installations. The problem is broader than that. Civilian employees work for their civilian employers on land owned or controlled by the Atomic Energy Commission. Security is as important in such places as on military installations. There is no "history" to which the Atomic Energy Commission can appeal. And on the question of civilian presence on governmental land there is no basis for differentiating the Atomic Energy Commission from a military commander.

Finally, the ultimate relevant source of authority short of the Constitution is the President or Congress. Department practice is germane only as executive or congressional authorization is inferrable from knowledge of and acquiescence in it. But a far more impres-

sive showing of inferred authorization was rejected in *Green v. McElroy*, 360 U.S. 474, 499-508. And the Constitution still stands in the way. A right to violate the Constitution is not acquired by prescription. This Court set aside nearly a century of judicial practice when its incompatibility with the Constitution became evident. *Eric Railroad Co. v. Tompkins*, 304 U.S. 64, 77-78. Nor did executive practice validate unconstitutional action by the President. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 588-589. The soliloquies of Judge Advocates General, even if they mean what respondents say, are small sounds in comparison.

C. Due Process

Respondents do not contest denial of due process but contend that Rachel Brawner had no "liberty" or "property" protected by it (Res. br. p. 57). Respondents attempt to refight a battle and regain ground that they have long since lost.

1. Respondents contend that, defamation aside, the interests asserted by petitioners have no analogue in private tort law, and that the Constitution does not subject government "to greater duties because it is the government . . ." (Res. br. p. 61-62): Respondents are wrong on both counts.

At least since *Lumley v. Gye*, 2 Ell. & Bl. 216, unjustified interference with an advantageous relationship has been a tort.¹⁵ In the absence of valid authority to act, respondents' status is simply that of tortfeasors inducing the breach of a contract (the collective bargaining agreement) and the termination of an advan-

¹⁵ The history is traced in Restatement, Torts, Vol. IV, pp. 49-53.

tageous relationship (the employment of Rachel Brawner safeguarded by the collective bargaining agreement). This Court was explicit as to this in *Greene v. McElroy*, 360 U.S. 474, 493, n. 22, stating that: "Respondents' actions, directed at petitioner as an individual, caused substantial injuries, . . . and, were they the subject of a suit between private persons, they could be attacked as an invasion of a legally protected right to be free from arbitrary interference with private contractual relationships. Moreover, petitioner has the right to be free from unauthorized actions of government officials which substantially impair his property interests." Nor can *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, be relegated, as respondents would (Res. br. p. 72), simply to vindication of a common law right to be free of defamation. Justiciability in the latter case did "not depend solely on the fact that the action challenged is defamatory." Mr. Justice Frankfurter, *id.* at 160. It rested also on interference with the "membership relation. . . ." *Id.* at 159.

Nor is it true that the Constitution protects only against invasions which would constitute wrongs between private persons. Standing "may be based on an interest created by the Constitution or a statute." *Id.* at 152. When the Fifth Amendment safeguards against deprivation "of life, liberty, or property, without due process of law," the protection it extends is not confined within the rubric of private law. The Constitution is its own measure of the security it vouchsafes. New wrongs innovated by governmental officers will not escape constitutional condemnation because they do not resemble a private tort.

2. Although respondents state that they "do not think these issues can be fruitfully discussed in terms of petitioners' 'standing,'" (Res. br. p. 59), they nevertheless rely heavily on *Perkins v. Lukens Steel Co.*, 310 U.S. 113, a case based exclusively on standing (Res. br. pp. 64-67). They assert that Rachel Brawner and the would-be sellers to the Government in *Lukens* are on a par.

In *Lukens*, Congress by statute provided that, in selling goods to the Government, the seller must pay its employees the minimum wage prevailing in the locality in which the seller operates as determined by the Secretary of Labor. After notice and hearing (310 U.S. at 117-120), the Secretary's designee determined the "locality" in which certain steel companies operated and established the minimum wage. The steel companies challenged the determination of the "locality," claiming that it was erroneous. They said that if they were required to pay the minimum wages in that locality, they could not successfully bid on government contracts, and they would therefore suffer a loss of income. In this context this Court held that the would-be sellers had no standing to complain.¹⁶

Every operative fact in this case is different from *Lukens*. In *Lukens*, "The contested action of the restrained officials did not invade private rights in a manner amounting to a tortious violation" (310 U.S. at 129). In this case it did. In *Lukens*, "it was not asserted that the authority under which the Government acted was invalid; only the correctness of an interpretation of a statute in the course of the exercise

¹⁶ After the decision in *Lukens* Congress amended the statute to provide for judicial review at the instance of an "interested person." *George v. Mitchell*, 282 F. 2d 486 (C.A.D.C.).

of an admitted power was challenged." Mr. Justice Frankfurter in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 160; and see *id.* at 152-153. In this case the existence of authority and its validity if it exists are challenged. In *Lukens* there could be no claim of denial of procedural due process, for notice and hearing had been granted. And there could be no claim of denial of substantive due process, because the "locality" fixed was well within the regulatory power of Congress itself to establish or to delegate to administrative determination. In this case procedural due process was denied, and whether substantive due process was also denied can only be ascertained after the veil of secrecy is lifted by granting procedural due process.

Lukens and this case would be similar only if in *Lukens* the would-be seller in contracting with the Government had been required, as a condition of selling to the Government, to dismiss any employees who "fail to meet the security requirements . . . as determined by the Security Officer of the Activity" (R. 6). But it was *Greene v. McElroy*, not *Lukens*, which decided that case. And, contrary to respondents' undocumented assertion (Res. br. p. 67), we know of no constitutional doctrine which allows officers acting in a proprietary capacity in the exercise of a governmental function to abridge rights which they are required to respect when acting in a regulatory capacity. *Greene v. McElroy* itself negatives any such bifurcation. Valid authority to act is required whether it is a regulatory or proprietary function which is exercised.¹⁷

¹⁷ Indeed, the distinction between the two was evolved to create greater liability on governmental units when acting in a proprietary capacity. *Trenton v. New Jersey*, 262 U.S. 182, 191-192.

3. After arguing at length that Rachel Brawner has no "liberty" or "property" which due process protects,¹⁸ respondents are required to acknowledge, in deference to this Court's decisions in *Wieman v. Updegraff*, 344 U.S. 183, and *Slochower v. Board of Higher Ed.*, 350 U.S. 551, that there is at least enough "liberty" and "property" to invoke the protection of substantive due process but, they say, not procedural due process (Res. br. pp. 67-71). It is hard to understand why "liberty" or "property" for the purpose of substantive due process is not "liberty" or "property" for the purpose of procedural due process. Respondents tell us that, while it is not a distinction which this Court has made "explicit" (Res. br. p. 70), *Wieman* and *Slochower* are truly to be explained as denials of equal protection, not due process (Res. br. pp. 69-70). But this Court said in *Wieman* that the test "oath offends due process" (344 U.S. at 191), and it said in *Slochower* that a discharge for invoking the privilege against self-incrimination "violates due process of law" (350 U.S. at 559). And since these cases are based on the Fourteenth Amendment, which includes an explicit equal protection clause as well as a due process clause, it was singularly obtuse of this Court to invoke the wrong clause. Furthermore, respondents agree that the power denied by *Wieman* and *Slochower* to the States under the Fourteenth Amendment is also denied to the federal government under the Fifth Amendment. But since the Fifth Amendment does not

¹⁸ Respondents contend that, as Rachel Brawner could lose her job by the closing of the Gun Factory or the cessation of cafeteria operations on the premises, she loses nothing if she is deprived of her job before either event (Res. br. pp. 78-79). We had not understood that the liability of a person to a natural death excuses his murder.

contain an equal protection clause, the prohibition must operate via the due process clause, and this requires a deprivation of "liberty" or "property." That the deprivation is grounded in discriminatory action, rather than arbitrary action, does not alter the fact that it is "liberty" or "property" which is being taken. *Bolling v. Sharpe*, 347 U.S. 497, 499-500. And if it is "liberty" or "property" for the purpose of substantive due process, it cannot be something less for the purpose of procedural due process. Finally, respondents' writings ignore *Greene v. McElroy*, a case of procedural due process. On respondents' hypothesis, this Court was mistaken in that case in believing that there was a serious constitutional question presented which should be avoided, for William Greene had no "liberty" or "property" capable of deprivation by a denial of procedural due process.

A fundamental insensitivity underlies respondents' slighting of procedural due process by the dichotomy they draw between it and substantive due process. If there is any primacy between the two, it belongs to procedural due process. Forty years ago, Mr. Justice Brandeis observed that "in the development of our liberty insistence upon procedural regularity has been a large factor." *Burdeau v. McDowell*, 256 U.S. 465, 477. Mr. Justice Frankfurter wrote for this Court that "The history of liberty has largely been the history of observance of procedural safeguards." *McNabb v. United States*, 318 U.S. 332, 347. Concurring in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 179, Mr. Justice Douglas stated that "It is not without significance that most of the provisions of the Bill of Rights are procedural. It is procedure that spells much of the difference between rule by law

and rule by whim or caprice. Steadfast adherence to strict procedural safeguards is our main assurance that there will be equal justice under law." And see Mr. Justice Frankfurter, *id.* at 164: "Procedural fairness and regularity," said Mr. Justice Jackson, "are of the indispensable essence of liberty." Dissenting in *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224.

Respondents see little use in procedural due process because in their view not much can in any event be done to safeguard employees from substantive arbitrariness. According to them, "final responsibility . . . must lie in the executive; . . . the executive may ultimately act in this area on doubts or simply a lack of complete confidence; and . . . the ultimate determination and judgment of the executive are not judicially reviewable" (Res. br. p. 80). They reiterate that action may "be based on no more than doubt . . ." (*ibid.*); and they say again that "the government's action need imply no more than a *doubt* of her reliability—a doubt consistent with the likelihood . . . that she is *in fact* loyal" (*id.* at 86, emphasis in original).

We had thought that "the nature and the theory of our institutions of government . . . do not mean to leave room for the play and action of purely personal and arbitrary power." *Yick Wo v. Hopkins*, 118 U.S. 356, 366. If the reliability of a person were doubted because he is a "Republican, Jew, or Negro," that doubt could not stand. Judicial correction of action based on that doubt could not be resisted by invoking immunity to judicial review. And a standard of action based "on no more than doubt" itself presents a grave question of constitutional validity. For by such a standard "the Anglo-Saxon presumption of

innocence is shifted and for all practical purposes the burden is placed on the individual to prove beyond a reasonable doubt his loyalty and integrity. When it is remembered that the employees or applicants are being judged not on their actions but on their supposed ideas or mental attitudes and that the charges against them may be based on secret evidence, the extreme nature of this final action is apparent. It may indeed be asked whether the dangers which confront us are really of such a character as to justify such radical departures from what have traditionally been thought to be constitutional standards of fair play." O'Brien, *New Encroachments On Individual Freedom*, 66 Harv. L. Rev. 1, 19 (1952).¹⁹

But whatever the content of substantive protection, it can never be realized until procedural due process is first extended. We must know what is being done before we can know whether something should be done about it. The spy that the security officer thinks he has spotted may turn out on a hearing to be a case of mistaken identity. "Liberty is established and preserved by the development and maintenance of proper procedures. It is, in the last analysis, only through procedural rules that the individual is protected against arbitrary governmental action. And, . . . the very essence of liberty is the protection of the individual against arbitrary application of the collective power of the state." Griswold, *The Fifth Amendment Today*, 39 (1955).

¹⁹ Respondents rely on and quote from *Von Knorr v. Miles*, 60 F. Supp. 962, 971 (D. Mass.) (Res. br. p. 81). So did the court below in *Greene v. McElroy* (254 F. 2d at 951-952 and n. 21), but this Court in its opinion did not mention the case. The dead ought to be allowed to stay buried.

4. Respondents inveigh against judicial intrusion into the "internal affairs" of government and "the discretion of the executive" (Res. br. p. 72). The action challenged here is unauthorized or unconstitutional conduct. If it be so, the "actions would not constitute exercises of . . . administrative discretion, and . . . judicial relief from this illegality would be available." *Harmon v. Brucker*, 355 U.S. 579, 582. The historic function of the judiciary is to curb just such executive excess. "The objection to judicial restraint of an unauthorized exercise of powers is not weighty." Mr. Justice Frankfurter concurring in *Joint Anti-Fascist Refugee Com. v. McGrath*, 341 U.S. 123, 157.

D. First Amendment

According to respondents, an adverse security determination may be made "on the basis of speech or action which may be within the general area of the First Amendment, but which raises a suspicion that the person is or could easily become a security risk, or even merely produces a lack of confidence in the person" (Res. br. p. 59, n. 35). Thus "suspicion" or "lack of confidence" drawn from the valid exercise of First Amendment rights is confessedly a basis for adverse action. The collision with the First Amendment could hardly be more forthright. This is the law of seditious libel clothed in contemporary garb.

More than that. The adverse determination based on the exercise of First Amendment rights is altogether *ex parte* and summary. There is no opportunity even to show that what was thought to be said was in fact not said, or that what was said does not reasonably permit an inference of "suspicion" or "lack of con-

fidence." And on respondents' view there is no question of "separation of legitimate from illegitimate speech. . . ." *Speiser v. Randall*, 357 U.S. 513, 525. For legitimate speech itself is claimed to be a valid basis for adverse action. On respondents' premise it is therefore beside the point that the "vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized." *Id.* at 526. Any speech is fair game that a security officer thinks is suspicious. Thus we have the double vice of predicating adverse action on the valid exercise of First Amendment rights plus the taking of such action on what may be "incompetent information or no information at all." *Id.* at 528. If this does not offend the First Amendment, then it fails to keep pace with contemporary methods of suppression.

Respectfully submitted,

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January 1961

SUPREME COURT OF THE UNITED STATES

No. 97.—OCTOBER TERM, 1960.

Cafeteria and Restaurant Workers
Union, Local 473, AFL-CIO, et
al., Petitioners,

v.

Neil H. McElroy, et al.

On Writ of Certio-
rari to the United
States Court of
Appeals for the
District of Colum-
bia Circuit.

[June 19, 1961.]

MR. JUSTICE STEWART delivered the opinion of the Court.

In 1956 the petitioner Rachel Brawner was a short-order cook at a cafeteria operated by her employer, M & M Restaurants, Inc., on the premises of the Naval Gun Factory¹ in the city of Washington. She had worked there for more than six years, and from her employer's point of view her record was entirely satisfactory.

The Gun Factory was engaged in designing, producing, and inspecting naval ordnance, including the development of weapons systems of a highly classified nature. Located on property owned by the United States, the installation was under the command of Rear Admiral D. M. Tyree, Superintendent. Access to it was restricted, and guards were posted at all points of entry. Identification badges were issued to persons authorized to enter the premises by the Security Officer, a naval officer subordinate to the Superintendent. In 1956 the Security Officer was Lieutenant Commander H. C. Williams. Rachel Brawner had been issued such a badge.

¹ The name of the Naval Gun Factory has now been officially changed to Naval Weapons Plant. It will be referred to as the "Gun Factory" in this opinion.

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The cafeteria where she worked was operated by M & M under a contract with the Board of Governors of the Gun Factory. Section 5 (b) of the contract provided:

"... In no event shall the Concessionaire engage, or continue to engage, for operations under this Agreement, personnel who

"(iii) fail to meet the security requirements or other requirements under applicable regulations of the Activity, as determined by the Security Officer of the Activity."

On November 15, 1956, Mrs. Brawner was required to turn in her identification badge because of Lieutenant Commander Williams's determination that she had failed to meet the security requirements of the installation. The Security Officer's determination was subsequently approved by Admiral Tyree, who cited § 5 (b) (iii) of the contract as the basis for his action. At the request of the petitioner Union, which represented the employees at the cafeteria, M & M sought to arrange a meeting with officials of the Gun Factory "for the purpose of a hearing regarding the denial of admittance to the Naval Gun Factory of Rachel Brawner." This request was denied by Admiral Tyree on the ground that such a meeting would "serve no useful purpose."

Since the day her identification badge was withdrawn Mrs. Brawner has not been permitted to enter the Gun Factory. M & M offered to employ her in another restaurant which the company operated in the suburban Washington area, but she refused on the ground that the location was inconvenient.

The petitioners brought this action in the District Court against the Secretary of Defense, Admiral Tyree, and Lieutenant Commander Williams, in their individual and official capacities, seeking, among other things, to

compel the return to Mrs. Brawner of her identification badge, so that she might be permitted to enter the Gun Factory and resume her former employment. The defendants filed a motion for summary judgment, supported by various affidavits and exhibits. The motion was granted and the complaint dismissed by the District Court. This judgment was affirmed by the Court of Appeals for the District of Columbia, sitting *en banc*. Four judges dissented.² We granted certiorari because of an alleged conflict between the Court of Appeals's decision and *Greene v. McElroy*, 360 U. S. 474. 364 U. S. 813.

As the case comes here, two basic questions are presented. Was the commanding officer of the Gun Factory authorized to deny Rachel Brawner access to the installation in the way he did? If he was so authorized, did his action in excluding her operate to deprive her of any right secured to her by the Constitution?

I.

In *Greene v. McElroy*, *supra*, the Court was unwilling to find, in the absence of explicit authorization, that an aeronautical engineer, employed by a private contractor on private property, could be barred from following his profession by governmental revocation of his security clearance without according him the right to confront and cross-examine hostile witnesses. The Court in that case found that neither the Congress nor the President had explicitly authorized the procedure which had been followed in denying Greene access to classified information. Accordingly we did not reach the constitutional issues

² The appeal was originally heard by a panel of three judges, and the District Court's judgment was reversed, one judge dissenting. After rehearing *en banc*, the original opinion was withdrawn, and the District Court's judgment was affirmed. 284 F. 2d 173.

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which that case otherwise would have presented. We proceed on the premise that the explicit authorization found wanting in *Greene* must be shown in the present case, putting to one side the Government's argument that the differing circumstances here justify less rigorous standards for measuring delegation of authority.

It cannot be doubted that both the legislative and executive branches are wholly legitimate potential sources of such explicit authority. The control of access to a military base is clearly within the constitutional powers granted to both Congress and the President. Article I, § 8, of the Constitution gives Congress the power to "provide and maintain a Navy;" to "make Rules for the Government and Regulation of the land and naval Forces;" to "exercise exclusive Legislation . . . over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazine, Arsenals, dock-Yards, and other needful Buildings;" and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" Broad power in this same area is also vested in the President by Article II, § 2, which makes him the Commander in Chief of the Armed Forces.

Congress has provided that the Secretary of the Navy "shall administer the Department of the Navy" and shall have "custody and charge of all . . . property of the Department." 10 U. S. C. § 5031 (a)(c). In administering his Department, the Secretary has been given statutory power to "prescribe regulations, not inconsistent with law, for the government of his department, . . . and the custody, use, and preservation of the . . . property appertaining to it." 5 U. S. C. § 22. The law explicitly requires that United States Navy Regulations shall be approved by the President, 10 U. S. C. § 6011, and the

pertinent regulations in effect when Rachel Brawner's identification badge was revoked had, in fact, been expressly approved by President Truman on August 9, 1948.

The requirement of presidential approval of Navy regulations is of ancient vintage.³ The significance of such presidential approval has often been recognized by this Court. *Smith v. Whitney*, 116 U. S. 167, 181; *Johnson v. Sayre*, 158 U. S. 109, 117; *United States Grain Corp. v. Phillips*, 261 U. S. 106, 109; *Denby v. Berry*, 263 U. S. 29, 37.⁴ We may take it as settled that Navy Regulations approved by the President are, in the words of Chief Justice Marshall, endowed with "the sanction of the law." *United States v. Maurice*, 2 Brock. 96, 105.⁵ And we find no room for substantial doubt that the Navy Regulations in effect on November 15, 1956, explicitly conferred upon Admiral Tyree the power summarily to deny Rachel Brawner access to the Gun Factory.

Article 0701 of the Regulations delineates the traditional responsibilities and duties of a commanding officer. It provides in part as follows:

"The responsibility of the commanding officer for his command is absolute, except when, and to the extent, relieved therefrom by competent authority, or as provided otherwise in these regulations. The

³ See R. S. § 1547 (1875) which was derived from the Act of July 14, 1862, c. 164, § 5, 12 Stat. 565. See also the Act of April 24, 1816, c. 69, § 9, 3 Stat. 298; the Act of March 3, 1813, c. 52, § 5, 2 Stat. 819.

⁴ See also 25 Op. Atty. Gen. 270.

⁵ The absence of presidential approval was relied upon in one case as a basis for finding certain administrative action unauthorized. See *Phillips v. United States Grain Corp.*, 279 F. 244, 248-249, rev'd on other grounds, 261 U. S. 106. See also 25 Op. Atty. Gen. 270, 275.

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authority of the commanding officer is commensurate with his responsibility, subject to the limitations prescribed by law and these regulations. . . ."

Article 0734 of the Regulations provides:

"In general, dealers or tradesmen or their agents shall not be admitted within a command, except as authorized by the commanding officer:

"1. To conduct public business.

"2. To transact specific private business with individuals at the request of the latter.

"3. To furnish services and supplies which are necessary and are not otherwise, or are insufficiently, available to the personnel of the command."

It would be difficult to conceive of a more specific conferral of power upon a commanding officer, in the exercise of his traditional command responsibility, to exclude from the area of his command a person in Rachel Brawner's status. Even without the benefit of the illuminating gloss of history, it could hardly be doubted that the phrase "tradesmen or their agents" covered her status as an employee of M & M with explicit precision.⁶ But the meaning of the regulation need not be determined *in vacuo*. It is the verbalization of the unquestioned authority which commanding officers of military installations have exercised throughout our history.⁷

An opinion by Attorney General Butler in 1837 discloses that the power of a military commanding officer to

⁶ A tradesman has been defined by Webster as "a shopkeeper; also, one of his employees." Webster, *New International Dictionary* (Second Edition, Unabridged, 1958), 2684.

⁷ The contrast with the history of the security program involved in *Greene v. McElroy* is striking. There it was pointed out that "[p]rior to World War II, only sporadic efforts were made to control the clearance of persons who worked in private establishments which manufactured materials for national defense." 360 U. S., at 493.

exclude at will persons who earned their living by working on military bases was even then of long standing. Speaking of the Superintendent of the Military Academy, the Attorney General's opinion stated:

"[H]e has always regarded the citizens resident within the public limits—such as the sutler, keeper of the commons, tailor, shoemaker, artificers, etc., even though they own houses on the public grounds, or occupy buildings belonging to the United States . . . —as *tenants at will*, and liable to be removed whenever, in the opinion of the superintendent, the interests of the academy require it. 'This,' he observes, 'has been the practice since I have been in command; and such, I am told, was the usage under the administration of my predecessors.'" 3 Op. Atty. Gen. 268, 269.

This power has been expressly recognized many times. "The power of a military commandant over a reservation is necessarily extensive and practically exclusive, forbidding entrance and controlling residence as the public interest may demand." 26 Op. Atty. Gen. 91, 92. "[I]t is well settled that a post commander can, in his discretion, exclude all persons other than those belonging to his post from post and reservation grounds." JAGA 1904/16272, 6 May 1904. "It is well settled that a Post Commander can, under the authority conferred on him by statutes and regulations, in his discretion, exclude private persons and property therefrom, or admit them under such restrictions as he may prescribe in the interest of good order and military discipline (1918 Dig. Op. J. A. G. 267 and cases cited)." JAGA 1925/680.44, 6 October 1925.

Under the explicit authority of Article 0734 of the Navy Regulations, and in the light of the historically unques-

tioned power of a commanding officer summarily to exclude civilians from the area of his command, there can remain no serious doubt of Admiral Tyree's authority to exclude Rachel Brawner from the Gun Factory upon the Security Officer's determination that she failed to meet the "security requirements . . . of the Activity." Her admittance to the installation in the first place was permissible, in the commanding officer's discretion, only because she came within the exception to the general rule of exclusion contained in the third paragraph of Article 0734 of the Regulations. And the plain words of Article 0734 made absolute the commanding officer's power to withdraw her permission to enter the Gun Factory at any time.

II.

The question remains whether Admiral Tyree's action in summarily denying Rachel Brawner access to the site of her former employment violated the requirements of the Due Process Clause of the Fifth Amendment. This question cannot be answered by easy assertion that, because she had no constitutional right to be there in the first place, she was not deprived of liberty or property by the Superintendent's action. "One may not have a constitutional right to go to Baghdad, but the Government may not prohibit one from going there unless by means consonant with due process of law." *Homer v. Richmond*, — F. 2d — (C. A. D. C. Cir., April 20, 1961). It is the petitioner's claim that due process in this case required that Rachel Brawner be advised of the specific grounds for her exclusion and be accorded a hearing at which she might refute them. We are satisfied, however, that under the circumstances of this case such a procedure was not constitutionally required.

The Fifth Amendment does not require a trial-type hearing in every conceivable case of government impair-

ment of private interest. "For, though 'due process of law' generally implies and includes *actor, reus, judex*, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings, . . . yet, this is not universally true." *Murray's Lessee v. Hoboken Land and Improvement Co.*, 18 How. 272, 280. The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Communications Comm'n v. WJR*, 337 U. S. 265, 275-276; *Hannah v. Larche*, 363 U. S. 420, 440, 442; *Hagar v. Reclamation District No. 108*, 111 U. S. 701, 708-709. "[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." It is "compounded of history, reason, the past course of decisions" *Joint Anti-Fascist Comm. v. McGrath*, 341 U. S. 123, 162-163 (concurring opinion).

As these and other cases make clear, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action. Where it has been possible to characterize that private interest (perhaps in over-simplification) * as a mere privilege subject to the Executive's plenary power, it has traditionally been held that notice and hearing are not constitutionally required. *Oceanic Navigation Co. v. Stranahan*, 214 U. S. 320, 340-343; *Knauff v. Shaughnessy*, 338 U. S. 537; *Jay v. Boyd*, 351 U. S. 345, 354-358; cf. *Buttfield v. Stranahan*, 192 U. S. 470, 497.

What, then, was the private interest affected by Admiral Tyree's action in the present case? It most assuredly was not the right to follow a chosen trade or

* See Davis, The Requirement of a Trial-Type Hearing, 70 Harv. L. Rev. 193, 222-224.

profession. Cf. *Dent v. West Virginia*, 129 U. S. 114; *Schware v. Board of Bar Examiners*, 353 U. S. 232; *Truax v. Raich*, 239 U. S. 33. Rachel Brawner remained entirely free to obtain employment as a short-order cook or to get any other job, either with M & M or with any other employer. All that was denied her was the opportunity to work at one isolated and specific military installation.

Moreover, the governmental function operating here was not the power to regulate or license, as lawmaker, an entire trade or profession, or to control an entire branch of private business, but, rather, as proprietor, to manage the internal operation of an important federal military establishment. See *People v. Crane*, 214 N. Y. 154, 167-169 (per Cardozo, J.); cf. *Perkins v. Lukens Steel Co.*, 310 U. S. 113, 129. In that proprietary military capacity, the Federal Government, as has been pointed out, has traditionally exercised unfettered control.

Thus, the nature both of the private interest which has been impaired and the governmental power which has been exercised makes this case quite different from that of the lawyer in *Schware*, *supra*, the physician in *Dent*, *supra*, and the cook in *Raich*, *supra*. This case, like *Perkins v. Lukens Steel Co.*, 310 U. S. 113, involves the Federal Government's dispatch of its own internal affairs. The Court has consistently recognized that an interest closely analogous to Rachel Brawner's, the interest of a government employee in retaining his job, can be summarily denied. It has become a settled principle that government employment, in the absence of legislation, can be revoked at the will of the appointing officer. In *the Matter of Hennen*, 13 Pet. 230, 246, 259; *Crenshaw v. United States*, 134 U. S. 99, 108; *Parsons v. United States*, 167 U. S. 324, 331-334; *Keim v. United States*, 177 U. S. 290, 293-294; *Taylor and Marshall v. Beckham*, (No. 1), 178 U. S. 548, 575-578. This principle was

reaffirmed quite recently in *Vitarelli v. Seaton*, 359 U. S. 535. There we pointed out that Vitarelli, an Interior Department employee who had not qualified for statutory protection under the Civil Service Act, "could have been summarily discharged by the Secretary at any time without the giving of a reason" 359 U. S., at 539.

It is argued that this view of Rachel Brawner's interest is inconsistent with our decisions in *United Public Workers v. Mitchell*, 330 U. S. 75, and *Wieman v. Updegraff*, 344 U. S. 183. In those two cases an individual's interest in government employment was recognized as entitled to constitutional protection, and it is contended that what the Court said in deciding them would require us to hold that Rachel Brawner was entitled to notice and hearing in this case. In *United Public Workers* the Court observed that "[n]one would deny" that "Congress may not 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.'" 330 U. S., at 100. In *Wieman* the Court held unconstitutional a statute which excluded persons from state employment solely on the basis of membership in alleged "Communist-front" or "subversive" organizations, regardless of their knowledge concerning the activities and purposes of the organizations to which they had belonged. In the course of its decision the Court said, "We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory." 344 U. S., at 192.

Nothing that was said or decided in *United Public Workers* or *Wieman* would lead to the conclusion that Rachel Brawner could not be denied access to the Gun Factory without notice and an opportunity to be heard.

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Those cases demonstrate only that the state and federal governments, even in the exercise of their internal operations, do not constitutionally have the complete freedom of action enjoyed by a private employer. But to acknowledge that there exist constitutional restraints upon state and federal governments in dealing with their employees is not to say that all such employees have a constitutional right to notice and a hearing before they can be removed. We may assume that Rachel Brawner could not constitutionally have been excluded from the Gun Factory if the announced grounds for her exclusion had been patently arbitrary or discriminatory—that she could not have been kept out because she was a Democrat or a Methodist. It does not follow, however, that she was entitled to notice and a hearing when the reason advanced for her exclusion was, as here, entirely rational and in accord with the contract with M & M.

Finally, it is to be noted that this is not a case where government action has operated to bestow a badge of disloyalty or infamy, with an attendant foreclosure from other employment opportunity. See *Wieman v. Updegraff*, 344 U. S. 183, 190-191; *Joint Anti-Facist Comm. v. McGrath*, 341 U. S. 123, 140-141; cf. *Bailey v. Richardson*, 86 U. S. App. D. C. 248, 182 F. 2d 46, aff'd by an equally divided Court, 341 U. S. 918.* All this record shows is that, in the opinion of the Security Officer of the Gun Factory, concurred in by the Superintendent, Rachel Brawner failed to meet the particular security requirements of that specific military installation. There is nothing to indicate that this determination would in any way impair Rachel Brawner's employment opportunities

* Compare Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193, 226-230, and Note, *The Supreme Court, 1950 Term*, 65 Harv. L. Rev. 107, 156-158, with *Richardson, Problems in the Removal of Federal Civil Servants*, 54 Mich. L. Rev. 219, 240-241.

anywhere else.¹⁰ As pointed out by Judge Prettyman, speaking for the Court of Appeals, "Nobody has said that Brawner is disloyal or is suspected of the slightest shadow of intentional wrongdoing. 'Security requirements' at such an installation, like such requirements under many other circumstances, cover many matters other than loyalty." 284 F. 2d, at 183. For all that appears, the Security Officer and the Superintendent may have simply thought that Rachel Brawner was garrulous, or careless with her identification badge.

For these reasons, we conclude that the Due Process Clause of the Fifth Amendment was not violated in this case.

Affirmed.

¹⁰ In oral argument government counsel emphatically represented that denial of access to the Gun Factory would not "by law or in fact" prevent Rachel Brawner from obtaining employment on any other federal property.

SUPREME COURT OF THE UNITED STATES

No. 97.—OCTOBER TERM, 1960.

Cafeteria and Restaurant Workers
Union, Local 473, AFL-CIO, et
al., Petitioners,

v.

Neil H. McElroy, et al.

On Writ of Certio-
rari to the United
States Court of
Appeals for the
District of Colum-
bia Circuit.

[June 19, 1961.]

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, dissenting.

I have grave doubts whether the removal of petitioner's identification badge for "security reasons" without notice of charges or opportunity to refute them was authorized by statute or executive order. See *Greene v. McElroy*, 360 U. S. 474 (1959). But under compulsion of the Court's determination that there was authority, I pass to a consideration of the more important constitutional issue, whether petitioner has been deprived of liberty or property without due process of law in violation of the Fifth Amendment.

I read the Court's opinion to acknowledge that petitioner's status as an employee at the Gun Factory was an interest of sufficient definiteness to be protected by the Federal Constitution from some kinds of governmental injury. Indeed, this acknowledgment seems compelled by our cases. *Wieman v. Updegraff*, 344 U. S. 183, (1952); *United Public Workers v. Mitchell*, 330 U. S. 75, 100 (1947) (*dictum*); *Torcaso v. Watkins*, *post*, p. —, decided today. In other words, if petitioner Brawner's badge had been lifted avowedly on grounds of her race, religion, or political opinions, the Court would concede that some constitutionally protected interest—whether

"liberty" or "property" it is unnecessary to state—had been injured. But, as the Court says, there has been no such open discrimination here. The expressed ground of exclusion was the obscuring formulation that petitioner failed to meet the "security requirements" of the naval installation where she worked. I assume for present purposes that separation as a "security risk," if the charge is properly established, is not unconstitutional. But the Court goes beyond that. It holds that the mere assertion by government that exclusion is for a valid reason forecloses further inquiry. That is, unless the government official is foolish enough to admit what he is doing—and few will be so foolish after today's decision—he may employ "security requirements" as a blind behind which to dismiss at will for the most discriminatory of causes.

Such a result in effect nullifies the substantive right—not to be arbitrarily injured by Government—which the Court purports to recognize. What sort of right is it which enjoys absolutely no procedural protection? I do not mean to imply that petitioner could not have been excluded from the installation without the full procedural panoply of first having been subjected to a trial, with cross-examination and confrontation of accusers, and proof of guilt beyond a reasonable doubt. I need not go so far in this case. For under today's holding petitioner is entitled to no process at all. She is not told what she did wrong; she is not given a chance to defend herself. She may be the victim of the basest calumny, perhaps even the caprice of the government officials in whose power her status rested completely. In such a case, I cannot believe that she is not entitled to some procedures. "[T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U. S. 123, 168 (1951)

(concurring opinion). See also *Homer v. Richmond*, — F. 2d — (C. A. D. C. Cir. 1961); *Parker v. Lester*, 227 F. 2d 708 (C. A. 9th Cir. 1955). In sum, the Court holds that petitioner has a right not to have her identification badge taken away for an "arbitrary" reason, but no right to be told in detail what the reason is, or to defend her own innocence, in order to show, perhaps, that the true reason for deprivation was one forbidden by the Constitution. That is an internal contradiction to which I cannot subscribe.

One further circumstance makes this particularly a case where procedural requirements of fairness are essential. Petitioner was not simply excluded from the base summarily, without a notice and chance to defend herself. She was excluded as a "security risk," that designation most odious in our times. The Court consoles itself with the speculation that she may have been merely garrulous, or careless with her identification badge, and indeed she might, although she will never find out. But in the common understanding of the public with whom petitioner must hereafter live and work the term "security risk" carries a much more sinister meaning. See *Beilan v. Board of Public Education*, 357 U. S. 399, 421-423 (1958) (dissenting opinion). It is far more likely to be taken as an accusation of communism or disloyalty than imputation of some small personal fault. Perhaps the Government has reasons for lumping such a multitude of sins under a misleading term. But it ought not to affix a "badge of infamy," *Wieman v. Updegraff*, *supra*, at 191, to a person without some statement of charges, and some opportunity to speak in reply.

It may be, of course, that petitioner was justly excluded from the Gun Factory. But in my view it is fundamentally unfair, and therefore violative of the Due Process Clause of the Fifth Amendment, to deprive her of a valuable relationship so summarily.